IN THE

Supreme Court of the United States

15
Number 20—Original

COMMONWEALTH OF PENNSYLVANIA, Complainant

vs.

STATE OF WEST VIRGINIA, Defendant.

Supplemental Brief for Complainant.

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This Court ordered that this case be restored to the docket for reargument, with special reference to the questions:

> "1. Whether the suit was not prematurely brought as no action has been taken either by the State or by the State Commission under the statute."

> "2. Whether the bill presents a cause justiciable between the two States parties to the action."

Complying with said order, answers to these questions, and, in addition, suggestions upon other questions raised during the previous oral argument, are respectfully submitted on behalf of complainant. As far as possible, repetition of the argument contained in the original briefs will be avoided.

I.

"WHETHER THE SUIT WAS NOT PREMATURELY BROUGHT AS NO ACTION HAS BEEN TAKEN EITHER BY THE STATE OR BY THE STATE COMMISSION UNDER THE STATUTE."

This is a suit under the original jurisdiction of this Court. Evidence was offered by complainant in support of the averments of the Bill, and by defendant in support of the averments of the Answer.

This Court, like any other court at *nisi prius*, is bound by the proofs. It must decide the questions of fact under the evidence. This question of "whether the suit was not prematurely brought as no action has been taken either by the State or by the State Commission under the statute," involves both questions of fact and of law.

The question of fact involved is: Would the effects, causing loss of life, health and property, proved by the uncontradicted evidence as sure to follow the enforcement of the statute, wait for the length of time necessary to obtain action by this Court, if complainant had deferred proceedings until after the State or its Commission had acted in accordance with the purpose and intent of the statute, and the powers sought to be given by the statute had been first exercised?

The question of law is: Is any action by the State or by its Commission necessary, before the statute, by its own terms, would produce these very effects which the uncontradicted evidence shows are sure to follow from the provisions of said statute?

This question of fact,—in reality this very suggestion of whether or not the suit was prematurely brought,—involves an intimate knowledge and consideration of the peculiarities and idiosyncrasies of the natural gas industry. It is significant that the defendant and its counsel, familiar with that industry, did not suggest this objection to the filing of this complaint, or the decision of this suit, at this time.

That the State and its Commission had not yet taken action towards the enforcement of this statute, is explained by the preliminary injunction issued by this Court, restraining such action.

Moreover, as said by this Court in *Ludwig, Secy. of State vs. Western Union Tel. Co.,* 216 U. S. 146, page 162:

> "According to well settled rules of statutory construction the validity of a statute, whatever its language, must be determined by its effect or operation as manifested by the natural and reasonable meaning of the words employed. *Henderson v. Mayor,* 92 U. S., 259, 268. If a statute by its necessary operation really and substantially burdens the interstate business of a foreign corporation seeking to do business in the State * * * then it is unconstitutional and void, although said legislature may not have intended to enact an invalid statute."

In *Minnesota v. Barber,* 136 U. S. 313, after citing and discussing authorities, it was said, by this Court at page 320:

> "Upon the authority of this case and others that could be cited it is our duty to inquire in respect to the statute before us not only whether

there is a real or substantial relation between its avowed objects and the means devised for obtaining those objects, but whether by its necessary or natural operation it impairs or destroys rights secured by the Constitution of the United States."

The statute under discussion in that case was one passed by the State of Minnesota providing for inspection in Minnesota, within 24 hours before being slaughtered, of beef offered for sale in Minnesota. The beef had been killed in Illinois and shipped to Minnesota. This Court said of this statute, at page 321:

> "The enactment of a similar statute by each one of the States composing the Union would result in the destruction of commerce among the several States so far as such commerce is involved in the transportation from one part of the country to another of animal meats designed for human food, and entirely free from disease. A careful examination of the Minnesota act will place this construction of it beyond question."

And again at page 323:

> "Our duty to maintain the Constitution will not permit us to shut our eyes to these obvious and necessary results of the Minnesota statute."

It was said by this Court in *Henderson v. Mayor of New York*, 92 U. S. 259, at page 268:

> "In whatever language the statute may be framed its purpose must be determined by its natural and reasonable effect."

The power of a court of equity to prevent by injunction contemplated or threatened injuries before they are actually inflicted, has been applied by this Court in

cases in which the injury was threatened by the enforcement of a State statute in conflict with the Commerce Clause of the Federal Constitution.

In *Savage v. Jones*, 225 U. S. 501, a manufacturer of cattle food filed his bill in equity to prevent the State officials from taking proceedings to enforce an Act of the State requiring the formula to appear on the wrapper on all such goods sold. In that case this Court said:

> "If the statute of Indiana, as applied to sales by importing purchasers in the original packages, constitutes an unwarrantable interference with interstate commerce in the complainant's product, he had standing to complain and was entitled to relief against enforcement by the defendant of the illegal demands."

Citing authorities.

The case of *Ludwig, Secy. of State v. Western Union Telegraph Co.*, 216 U. S. 416, involved a statute of Arkansas imposing on interstate companies a license tax for the privilege of filing its articles of incorporation as a condition to doing intrastate business, the license tax or fee being based on the whole capital stock of the company, whether employed within the State or elsewhere. This Court held that a suit to enjoin the enforcement of the statute was properly and timely brought, since to wait until an attempt was made to actually enforce the statute would work irreparable injury on complainant company. This Court said, at page 164:

> "In order to prevent the contemplated or threatened injury to the company the court below

properly made a decree perpetually enjoining the appellant as Secretary of State, his agents and attorneys, from making proclamation that the telegraph company has no authority to continue doing business in Arkansas."

The real inquiry is one of fact. Does the statute in controversy, as claimed by the complainant, "by its effect or operation, as manifested by the natural and reasonable meaning of the words employed," burden, interfere with, and in fact prevent and prohibit, interstate commerce in natural gas, and if it does is the Commonwealth of Pennsylvania justified in praying for this injunction now, before the injury contemplated or threatened, affecting not only property, but life and health, is actually suffered?

To put the question conversely: If by delaying proceedings the citizens of the Commonwealth of Pennsylvania would actually suffer the contemplated and threatened injuries, and action thereafter would be of no avail except to some extent to prevent the continuance of further like injuries, is not said Commonwealth, in the performance of its sovereign obligations to its people, in good faith, bound to proceed at once, without delay?

The whole purpose and intent of the statute, as shown by its terms, by the Answer of the State of West Virginia, and by the argument of its counsel, are hereafter to appropriate to the use of all classes of consumers within the State, domestic, industrial, and others, an adequate supply of gas before permitting any gas produced in the State of West Virginia to be transported across the state line to other States, as has been

the established course of business of these interstate gas companies, encouraged and sanctioned by the State of West Virginia for over a generation.

The uncontradicted evidence of the officials of every interstate natural gas company doing business in West Virginia, and of natural gas experts, shows that the carrying out of this purpose and intent will not only burden and interfere with, but will actually prevent and prohibit, the transportation of all natural gas from the State of West Virginia into other States. It would divert the natural gas, while in transit from West Virginia to other States, to the use of consumers in West Virginia. It would in effect be a seizure by the State of West Virginia, for the use of its own consumers, of natural gas committed to and in transportation in interstate commerce.

To delay action until after this purpose and intent had been carried out and effect accomplished, for whatever length of time, for even a comparatively few days, before this Court could act, would render such action of no practical value to prevent the doing of the wrong and the suffering of the injuries. In this connection this Court's attention is respectfully directed to the following considerations, namely:

1st. All of the dangers to life, health, comfort and convenience, will have been suffered by those deprived of fuel in their homes for cooking, heating, lighting, etc., though it should be for a few days only. Food in the home can be dispensed with, with less danger to life and health, and for a longer period, than can fuel in extreme cold weather.

2nd. As soon as the fuel supply is cut off, other fuel must be immediately substituted. The delay necessary to obtain an injunction, even if the parties and court acted with the utmost expedition, could not be endured, even for a few days, even for a few hours, without loss of life and health to those wholly dependent upon gas for their fuel supply.

3rd. The necessary delay, however short, incident to the change in the appliances necessary to burn other fuel in place of gas, and the obtaining of such other fuel, would occasion all of the loss of life, health, comfort, convenience and property shown by the uncontradicted evidence in the case to be inevitable from the enforcement of the statute, especially when there is taken into consideration the extraordinary demands for such appliances and fuel that would be created by millions of gas consumers clamoring at the same time for plumbers' services and fittings and fuel supplies.

4th. If consumers in Pennsylvania at any time even for a few hours or a few days are compelled to make these changes in appliances requisite for the burning of other fuel than gas (even where the construction of the houses permits such changes) after they have endured the hardships and risks to life and health, and have gone to the expense of making such changes, even though subsequently the court should declare the action of the State unwarranted, all the damage would have been done. The expense to the millions of consumers in Pennsylvania of making these changes would aggregate several hundred millions of dollars.

5th. If consumers and their families in Pennsylvania, aggregating many millions in number, as shown by the testimony, and whom the State of Pennsylvania

as *parens patriae*, represents in this litigation, are entitled, now or at any time hereafter, to the relief sought by the bill of complaint filed and now under consideration, they are entitled to the same without being first subjected to all the horrors and property losses pictured by the uncontradicted proofs in this case as sure to follow from the operation of this statute of West Virginia.

6th. This suit stands on a different footing from the ordinary proceeding by an individual to protect his private rights. It is brought by a sovereign State, pursuant to a resolution adopted by the Senate and House of Representatives and approved by its Governor. This resolution (page 21, Complaint of Pennsylvania; for the convenience of the Court reprinted as Exhibit "A" in the appendix to this brief) recites the facts (now proven by the evidence) as to the dangers to life, health, convenience and comfort, and the property losses to be apprehended from the enforcement of this statute, and directed the appeal to this Court to protect the millions of its citizens from these horrors and losses, because without action by the State these citizens were remediless. Could this State, without being recreant to its sovereign obligation, before putting into motion the machinery of the law for the protection of its citizens, have waited until much, if not all, of the evils to be apprehended had been suffered by its citizens? If by prompt action this State could save the life of a single citizen, or the health of a single family, (however poor —and the poor would suffer the most), was not its action *now* justified?

Where the complainants are States the same rule does not obtain as in litigation between private parties. When the lives and health of its people are involved the

State should act at once. No nice balancing of probabilities ought to be tolerated.

As was said by this Court in *Georgia v. Tennessee Copper Company*, 206 U. S. 230, at page 237, Mr. Justice Holmes delivering the opinion:

> "Some peculiarities necessarily mark a suit of this kind. If the State has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up quasi-sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice it may insist that an infraction of them shall be stopped. The States by entering the Union did not sink to the position of private owners subject to one system of private law. This court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power. Without excluding the considerations that equity always takes into account, we cannot give the weight that was given them in argument to a comparison between the damage threatened to the plaintiff and the calamity of a possible stop to the defendant's business, the question of health, the character of the forests as a first or second growth, the commercial possibility or impossibility of reducing the fumes to sulphuric acid, the special adaptation of the business to the place.
>
> It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they

better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source. If any such demand is to be enforced this must be, notwithstanding the hesitation that we might feel if the suit were between private parties, and the doubt whether for the injuries which they might be suffering to their property they should not be left to an action at law."

7th. If it can be presumed (which complainant avers it cannot), considering the terms of the statute, and the avowed purpose and intent as to the enforcement and the interpretation thereof by the State of West Virginia, as declared in its Answer, that said statute will not be so enforced as to prohibit, prevent, interfere with or burden interstate commerce in natural gas by its transportation out of the State of West Virginia, any decision of this Court as prayed by the complainant that said statute is unconstitutional to this extent, could not prejudice the rights of said State or deprive it of any prerogatives it might legally possess.

All of the foregoing reasons apply equally to the State of Pennsylvania, as a consumer of gas in its public institutions, such as homes, hospitals, houses of correction, etc., and to the municipal subdivisions of said State.

The only reason why this suffering by millions of consumers in Pennsylvania, and this property loss, aggregating hundreds of millions of dollars, have not already been imposed upon them by the operation of this statute, is because the operation thereof was en-

joined by this Court, pending the final determination of the questions now under consideration. If, after the vital organs of a patient have been removed by a surgical operation, the doctors in consultation agree that the operation should not have been made, such decision would afford the patient no relief, nor would it restore his organs!

Let it be noted that no action of the State itself, nor any of its officers, is required for the enforcement of the statute. Section One, without any further action by the State officials, courts or commission, absolutely compels every gas company to furnish an adequate supply to the public of West Virginia for all purposes for which natural gas may be desired by said public.

In the Answer filed by the State of West Virginia the State admits that it proposes to enforce this statute, even to the extent of enforcing the fines, penalties and imprisonment in the statute prescribed. (Answer, p. 44). It further admits that whether or to what extent under the changed conditions brought about by the enforcement of said statute the demands of the consumers in West Virginia would deplete or diminish the supply of gas available for transportation into Pennsylvania, will be dependent upon circumstances and contingencies referred to in the Answer.

The State of West Virginia further claims in its Answer that the effect of said statute will be to give to all of the consumers in West Virginia in the statute mentioned, to the extent of the gas mentioned, a reasonably adequate supply of gas, and says that the gas is affected with the use or interest of the said public of West Virginia, and claims that this use or interest of

said public is superior and prior to any rights flowing from the introduction of said gas into interstate commerce.

It follows, therefore, from the terms of the Act itself that no further action of the State of West Virginia is necessary, and from the averments of the Answer the State unequivocally asserts its intention to enforce the Act, even by fines, penalties and imprisonment.

Under the Second Section of the Act, which provides for a supply of gas to other public service companies by gas companies having a surplus *over and above what is required to supply their consumers in West Virginia*, the Public Service Commission is given authority to order said delivery and compulsory connection of lines for that purpose. The only discretion of the Commission is as to the convenience and necessity of the *West Virginia public*. The Section expressly authorizes such order by the Commission if the company has a supply in excess of the quantity sufficient *for all consumers in West Virginia who may desire to use gas.*

The fines and penalties provided by this Act are so great, each day being made a separate offence, that no company would dare to disobey the orders of the Commission, even long enough to raise the question of constitutionality of the Act by proper proceedings in the courts. Litigation for any length of time if unsuccessful would almost bankrupt any company. The imprisonment that would follow from even a short delay might mean incarceration during the lifetime of any officer of the gas company contesting the constitutionality of the statute.

As was said by Mr. Justice Brandeis, in *Oklahoma Operating Company v. Love*, 252 U. S. 331, page 336, of the statute then under consideration, the penalties whereof were nothing like as severe as those provided for in the statute in controversy:

> "But the penalties which may possibly be imposed if it pursues this course without success are such as well might deter even the boldest and most confident."

While the provision imposing the fines and imprisonment provided by the statute in controversy might be declared unconstitutional, if that question were raised by some bold and confident officer of one of the interstate companies, nevertheless, with such deterrents, in all reasonable probability any one of the interstate companies would find it less dangerous to comply with the statute than to raise the question of its constitutionality.

If, therefore, in cold weather, these compulsory connections are made and the interstate gas companies are compelled to make up the deficit of all local companies before the State of Pennsylvania could take any action whatever, it is manifest its people consuming natural gas would be subjected to the hazards to life, health, convenience and comfort, as well as property losses, described in the Bill of Complaint and proven by the evidence to follow from the enforcement of this provision of the statute.

The Answer of the State of West Virginia sets forth in explicit terms the contention of said State, that all gas produced in the State of West Virginia must be first applied to furnishing an adequate supply to all consumers in West Virginia who may desire to use the

same, before any of said gas can be introduced into interstate commerce or transported out of the State. This may include such use as for carbon black manufacture, generally condemned as being most wasteful. Can it be open to question, from the terms of the statute, the averments of the Answer, and the argument of counsel for the State of West Virginia, that its purpose and intention are to compel the application of all the gas produced or transported in the State to the supply of domestic, industrial and other consumers in that State who may desire the same for any purpose whatever before any thereof can be taken out of the State?

Nothing remains, therefore, to be done by the State or by its Public Service Commission, except, of course, the carrying out of this purpose and intention by the actual seizure of the gas for use within the State. To delay action, therefore, until after this actual seizure is made, *which seizure the State of West Virginia avows its purpose and intention to make*, would render valueless for the protection of citizens of Pennsylvania, any judgment or decree of this Court afterwards delivered or made.

The foregoing argument has been made principally upon the theory of a controversy between private individuals. Under the sixth reason above given why this suit was not prematurely brought, it was shown by citations from this Court that in suits where the complainant is a State, "if it has a case at all it is somewhat more certainly entitled to specific relief than a private party might be," and that other "peculiarities necessarily mark a suit of this kind."

In the case in controversy the legislature by formal action by both Houses, approved by the Governor, authorized and directed the Attorney General to institute

such legal proceedings and to do all other acts necessary to protect the rights and interests of the Commonwealth of Pennsylvania and of its citizens, etc.

The resolution recited the dangers to health, comfort, convenience and welfare of the people of the State from the enforcement of the statute in controversy, as well as the enormous property losses to which they would thereby be subjected.

There was no alternative left to the Attorney General by this action of the constituted authorities. There was no discretion left to the Attorney General. The dangers to health, comfort, convenience and welfare of the people and their threatened property losses are formally recited by the resolution.

What State official thereafter had the right to say "Such results may not follow. Had we better not wait and see?" Wait for what? See what? Whether or not the gas supply to consumers in Pennsylvania under the operation of the statute in controversy will be so diminished as to really affect the health and welfare of such consumers? What family or families are to be selected on which to try the experiment? How far must the experiment go? How many are to die, or get pneumonia or tuberculosis, before action should be taken?

Can a State thus deal with life and death, health and sickness, and not bring down upon itself the execration of all right-minded men?

If this statute in controversy at any time, now or hereafter, threatens to produce the dangers and damages alleged and proved, the State has the right, and it is its bounden duty to its people, before it is too late, by the loss of a single life or the health of a single family, to protect its people.

II.

"WHETHER THE BILL PRESENTS A CAUSE JUSTICIABLE BETWEEN THE TWO STATES PARTIES TO THE ACTION."

The temptation is with difficulty resisted to trace the historical development of this jurisdiction of this Court, when all the nations of the world at this time are considering the establishment of some great International Court to settle disputes between nations. Compacts and treaties have been made with this purpose. Societies have been organized of great publicists to make propaganda for the establishment of such a court,—a court having the same jurisdiction between nations as is possessed by this Court between the States of this Union.

As was said by Chief Justice Fuller in *Kansas v. Colorado*, 185 U. S. 125, at page 146, of this jurisdiction of controversies between States:

> "Sitting, as it were, as an international as well as domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand. * * ."

It was said of this jurisdiction of this Court in controversies between States, by William Wirt, in his argument in the case of *Cherokee Nation v. Georgia*:

> "The erection of such a tribunal was a sublime conception and worthy of the minds which planned our Constitution."

Beginning with the quarrels between the Colonies, before the Revolution, such as those between the Penns

and Lord Baltimore, continuing after the adoption of the Articles of Confederation, when a method was provided for arbitration between the States, and which furnished the suggestion of the system of original jurisdiction which was contained in the Constitution, it was manifest to the lawyers of pre-Revolutionary times that such original jurisdiction to determine disputes between the States must be conferred on some tribunal. The power conferred was general. There were no limitations in the constitutional provision conferring such power. As was pointed out by this Court in *Kansas v. Colorado*, 206 U. S. 46, in the opinion by Mr. Justice Brewer, at pages 81, 82 *et seq.*, that while as to its legislative powers this Government is acknowledged by all to be one of enumerated powers and that it can exercise only the powers granted to it:

> "On the other hand, in Article III, which treats of the judicial department—and this is important for our present consideration—we find that section 1 reads that 'the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.' By this is granted the entire judicial power of the nation. Section 2, which provides that 'the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States,' etc. is not a limitation nor an enumeration. It is a definite declaration, a provision that the judicial power shall extend to—that is, shall include—the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial

power. There may be, of course, limitations on that grant of power, but if there are any they must be expressed, for otherwise the general grant would vest in the courts all the judicial power which the new Nation was capable of exercising."

It was under this general grant of power that this Court, in *Chisholm v. Georgia,* 2 Dall. 419, held that this Court had jurisdiction in a suit brought by a citizen against a State. That decision led to the adoption of the Eleventh Amendment to the Constitution, which prohibited such actions in the future.

This Court, under this general grant of power, in 1794, in the case of *Georgia v. Brailsford,* 3 Dall. 1, tried a case before a jury, and after the jury had been charged by Chief Justice Jay, the verdict found for the defendant was duly entered.

Under this general power, as relating to controversies between the States, this Court has developed a jurisprudence founded on principles of universal application to the Federal law, to State law, and to international law, and founded upon an association of sovereign States, independent yet united, united by an agreement —the Constitution—the enforceability whereof is vested in the Supreme Court.

As was natural, in the eighty odd cases of controversies between the States that have come before this Court, objections have been made to this jurisdiction from time to time upon diametrically opposite grounds. For example, in the case of *Rhode Island v. Massachusetts,* 12 Pet. 657, Daniel Webster argued that the jurisdiction of suits between States extended only to matters ordinarily judicially cognizable, and not to suits of a political character, such as boundaries; while in later

cases exactly the opposite was contended, to wit, that the jurisdiction related solely to political questions, such as boundaries, etc.

These eighty odd cases have been controversies over a wide range of subjects,—over boundaries, riparian and fishery rights, public health, interstate commerce, obligations of the States, political and territorial questions arising out of the Civil War, etc., etc.

In the case of *Missouri v. Illinois*, 180 U. S. 208, Mr. Justice Shiras, in delivering the opinion of the Court (p. 218) reviewed the history of the grant to the Supreme Court of power over controversies between the States. He reviewed many cases in this Court, *New York v. Connecticut*, 4 Dall.; *New Jersey v. New York*, 5 Pet.; *Florida v. Georgia*, 11 How.; *Pennsylvania v. Bridge Co.*, 9 How, 11 How., 13 How., and 18 How.; *South Carolina v. Georgia*, 93 U. S.; *Wisconsin v. Duluth*, 96 U. S.; *New York v. Louisiana*, 108 U. S.; *Wisconsin v. Insurance Co.*, 127 U. S.; *Hans v. Louisiana*, 134 U. S.; and *Louisiana v. Texas*, 176 U. S.; and after this review propounded this question:

> "From the language of the Constitution and from the cases in which that language has been considered, what principles may be derived as to the nature and extent of the original jurisdiction of this Court in controversies between two or more States?"

He then states that from the language alone considered it might be concluded that, wherever a State made complaint against another State, jurisdiction attached, regardless of the nature of the complaint. He added, however:

> "But it must be conceded that upon further consideration in cases arising under different states

of facts, the general language used in *Cohens v. Virginia* has been to some extent modified."

He then cites the different classes of cases and discusses them, and calls attention to the fact that while the jurisdiction in those cases involved boundaries and jurisdiction over lands and their inhabitants, and in some instances directly affected the property rights and interests of a State, he concludes this review:

> "But such cases manifestly do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy; and it would be objectionable and, indeed, impossible, for the court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this court.
>
> An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the State of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant State. But it must surely be conceded that, *if the health and comfort of the inhabitants of a State are threatened,* the State is the proper party to represent and defend them. If Missouri were an independent and Sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy and that remedy, we think, is found in the constitutional provisions we are now considering.

The allegations of the bill plainly present such a case. The health and comfort of the large communities inhabiting those parts of the State situated on the Mississippi River are not alone concerned, but contagious and typhoidal diseases introduced in the river communities may spread themselves throughout the territory of the State. Moreover substantial impairment of the health and prosperity of the towns and cities of the State situated on the Mississippi River, including its commercial metropolis, would injuriously affect the entire State.

That suits brought by individuals, each for personal injuries, threatened or received, would be wholly inadequate and disproportionate remedies, requires no argument."

The foregoing opinion was delivered upon a demurrer to the bill of complaint. Upon the overruling of the demurrer the case went to trial, and when it came before this Court for final determination upon the evidence, (*Missouri v. Illinois*, 200 U. S. 406), this Court, by Mr. Justice Holmes, said, of the former decision in the case, (p. 518):

"* * * The only question presented was whether as between the States of the Union this court was competent to deal with a situation which, if it arose between independent sovereignties, might lead to war. Whatever differences of opinion there might be upon matters of detail, the jurisdiction and authority of this court to deal with such a case as that is not open to doubt."

The case of *Kansas v. Colorado*, 185 U. S., 125, followed the decision of this Court on the demurrer in *Missouri v. Illinois*. In that case the opinion was delivered

by Chief Justice Fuller, (page 139 *et seq.*) in which he said, (p. 141):

> "* * * And as the remedies resorted to by independent States for the determination of controversies raised by collision between them were withdrawn from the States by the Constitution, a wide range of matters, susceptible of adjustment, and not purely political in their nature, was made justiciable by that instrument."

He then cited with approval the opinion in *Missouri v. Illinois, and continued,* (p. 142):

> "As will be perceived, the court there ruled that the mere fact that a State has no pecuniary interest in the controversy, would not defeat the original jurisdiction of this court, which might be invoked by the State as *parens patriae,* trustee, guardian or representative of all or a considerable portion of its citizens; and that the threatened pollution of the waters of a river flowing between States, under the authority of one of them, thereby putting the health and comfort of the citizens of the other in jeopardy, presented a cause of action justiciable under the Constitution."

The State of Colorado asserted its selfish interests just as the State of West Virginia asserts hers in this case. As stated by Chief Justice Fuller, (page 143), the State of Colorado insisted that she, as a sovereign and independent State, if her material welfare demanded it, had the right to consume for beneficial purposes all the waters within her boundaries. (Substitute "gas" for "water," and West Virginia makes the same contention here).

Colorado further insisted that by the law of nations the primary and absolute right of a State is self-preservation; that the improvement of her revenues, arts, agriculture and commerce, are rights of sovereignty; that she has dominion over all things within her territory; that the moral obligations of a State to observe the demands of comity cannot be made the subject of controversy between States; and that the only controversies that are justiciable in the Supreme Court are those which prior to the adoption of the Constitution would have been just cause for reprisal, etc.

Speaking of these contentions, this Court, by Chief Justice Fuller, said, (p. 143):

> "But when one of our States complains of the infliction of such wrong or the deprivation of such rights by another State, how shall the existence of cause of complaint be ascertained, and be accommodated if well-founded? The States of this Union cannot make war upon each other. They cannot 'grant letters of marque and reprisal.' They cannot make reprisal on each other by embargo. They cannot enter upon diplomatic relations and make treaties.
>
> As Mr. Justice Baldwin remarked in *Rhode Island v. Massachusetts*: 'Bound hand and foot by the prohibitions of the Constitution, a complaining State can neither treat, agree, nor fight with its adversary, without the consent of Congress; a resort to the judicial power is the only means left for legally adjusting, or persuading a State. * * ."

This case came before this Court on final hearing after the evidence had been taken in *Kansas v. Colorado*, 206 U. S. 46. The opinion was delivered by Mr. Justice Brewer, beginning at page 80. Said the Court:

"While we said in overruling the demurrer that 'this court, speaking broadly, has jurisdiction,' we contemplated further consideration of both the fact and the extent of our jurisdiction, to be fully determined after the facts were presented. We therefore commence with this inquiry. And first of our jurisdiction of the controversy between Kansas and Colorado.

This suit involves no question of boundary or of the limits of territorial jurisdiction. Other and incorporeal rights are claimed by the respective litigants. Controversies between the States are becoming frequent, and in the rapidly changing conditions of life and business are likely to become still more so. Involving as they do the rights of political communities, which in many respects are sovereign and independent, they present not infrequently questions of far-reaching import and of exceeding difficulty."

The Court then proceeds to consider the foundations of its jurisdiction over controversies between States, and concludes, (page 83):

"Speaking generally, it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature, the parties to which or the property involved in which may be reached by judicial process, and when the judicial power of the United States was vested in the Supreme and other courts all the judicial power which the Nation was capable of exercising was vested in those tribunals, and unless there be some limitations expressed in the Constitution it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the Nation, no matter who may be the parties thereto."

In the above case the principles laid down in *Missouri v. Illinois* were then adopted and applied and the jurisdiction of the Court upheld.

In *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, this Court held that a suit by a State for an injury to it in its capacity of quasi-sovereignty, even without any direct financial interest, could be maintained, and said, (page 237):

> "The caution with which demands of this sort, on the part of a State, for relief from injuries analogous to torts, must be examined, is dwelt upon in *Missouri v. Illinois*, 200 U. S. 496, 520, 521. But it is plain that some such demands must be recognized, if the grounds alleged are proved. When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court. *Missouri v. Illinois*, 180 U. S. 208, 241."

In the latest utterance of this court on this subject, in the case of *New York v. New Jersey*, decided in May, 1921, and reported in the United States Supreme Court Advance Opinions, at page 544, it was said, by Mr. Justice Clarke, (p. 547):

> "* * * the right of the State to maintain such a suit as is stated in the bill is very clear. The health, comfort and prosperity of the people of the State and the value of their property being gravely menaced, as it is averred that they are by the proposed action of the defendants, the state is

the proper party to represent and defend such rights by resort to the remedy of an original suit in this court, under the provisions of the Constitution of the United States. *Missouri v. Illinois*, 180 U. S. 208, 241, 243 * *; *Georgia v. Tenn. Copper Co.*, 206 U. S. 230. * * * ."

It will be observed that in the cases of *Kansas v. Colorado*, *Georgia v. Tennessee Copper Co.*, and *New York v. New Jersey*, the complainant States had no pecuniary interest, but appeared as *parens patriae* or trustee for their people, for the protection of their lives, health, comfort and convenience. In none of these cases, except that of *Georgia v. Tennssee Copper Co.*, could the individual citizens of the complainant States have maintained a suit, and in each of these cases only a portion of the citizens of the State were affected by the proposed action of the defending State. All of these conditions obtain in the case at bar.

It would seem that this Court, in *Missouri v. Illinois*, 180 U. S.; *Kansas v. Colorado*, 185 U. S.; *Missouri v. Illinois*, 200 U. S.; *Kansas v. Colorado*, 206 U. S.; *Georgia v. Tenn. Copper Co.*, 206 U. S.; and *New York v. New Jersey*, Advance Opinions, not yet reported; *supra.*; has unwaveringly and unflinchingly adopted the rule laid down by Mr. Justice Shiras in *Missouri v. Illinois*, 108 U. S., to the effect that "if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them," in its capacity of *parens patriae* or trustee for its people, and that this court has original jurisdiction in such actions.

Under the averments of the bill of complaint and the proofs in the case, the complainant State has appeared to protect the lives, health, comfort, convenience and the rights of its citizens.

There is nothing in the case of *Louisiana v. Texas*, 176 U. S. 1, so much relied upon by the defendant, the State of West Virginia, in its argument against jurisdiction by this Court, that militates against the foregoing contention. In that case the action was brought by the State of Louisiana against the State of Texas on account of the latter's quarantine laws, or rather the manner of the enforcement thereof, claiming that it prevented citizens of Louisiana, and especially of New Orleans, from engaging in interstate commerce with people in the State of Texas; and it was to enforce this right of such citizens of Louisiana so to engage in interstate commerce, that the suit was brought by the State as *parens patriae*, etc. of such citizens.

Moreover, in the case of *Louisiana v. Texas* it was not contended by the State of Louisiana that the Texas quarantine law was void, but the sole contention was that the health officer of Texas, by rules and regulations which were approved by the Governor, produced the infraction of the Constitutional provision protecting interstate commerce. The State of Louisiana was attempting to enforce the rights of certain of its citizens to engage in commerce with citizens in Texas.

This distinguishing feature of the case from the principle laid down in *Missouri v. Illinois*, is referred to by this Court in its opinion in the latter case, (180 U. S. 208, 237), referring to its former opinion in the case of *Louisiana v. Texas*, in these words:

> "After quoting the provisions of the statute of the State of Texas, regulating the subject of quarantine, the Chief Justice proceeded to say:
>
> 'It is not charged that this statute is invalid, nor could it be if tested by its terms. While it is true that the power vested in Congress to regulate

commerce among the States is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution, and that where the action of the States in the exercise of their reserved powers comes into collision with it, the latter must give way, yet it is also true that quarantine laws belong to that class of state legislation which is valid until displaced by Congress, and that such legislation has been expressly recognized by the laws of the United States almost from the beginning of the government. * * * The complaint here, however, is not that the laws of Texas in respect of quarantine are invalid, but that the health officer, by rules and regulations framed and put in force by him thereunder, places an embargo in fact on all interstate commerce between the State of Louisiana and the State of Texas, and that the Governor permits these rules and regulations to stand and be enforced, although he has the power to modify or change them. The bill is not rested merely on the ground of the imposition of an embargo without regard to motive, but charges that the rules and regulations are more stringent than called for by the particular exigency, and are purposely framed with the view to benefit the State of Texas, and the city of Galveston in particular, at the expense of the State of Louisiana, and especially of the city of New Orleans.

'But in order that a controversy between States, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one State are injured by the maladministration of the laws of another. The States cannot make war, or enter into treaties, though they may, with the consent of Congress, make compacts and agreements. Where there is no agreement, where

breach might create it, a controversy between States does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one State to a distinct collision with a sister State.

'In our judgment, this bill does not set up facts which show that the State of Texas has so authorized or confirmed the alleged action of her health officer as to make it her own, or from which it necessarily follows that the two States are in controversy within the meaning of the Constitution.' "

It was admitted in the case of *Louisiana vs. Texas* "that quarantine laws belong to that class of state legislation which is valid until displaced by Congress, and that such legislation has been expressly recognized by the laws of the United States almost from the beginning of the government," and it was the improper enforcement of such a quarantine law of which the State of Louisiana complained, because it alleged that thereby some of its citizens were prevented from engaging in interstate commerce with citizens of Texas.

If, therefore, the statement of this Court that:

> "* * * Inasmuch as the vindication of the freedom of interstate commerce is not committed to the State of Louisiana, and that State is not engaged in such commerce, the cause of action must be regarded not as involving any infringement of the powers of the State of Louisiana, or any special injury to her property, but as asserting that the State is entitled to seek relief in this way because the matters complained of affect her citizens at large."

be considered with reference to the facts of the case

and the situation there described, it will be manifest that the same cannot affect the question of jurisdiction in this case, where the complaint is that the State of West Virginia has passed a law that is unconstitutional, and which law affects the lives, health, comfort and convenience of millions of the citizens of the State of Pennsylvania.

There is no question here of the complainant State undertaking to vindicate the right of its citizens to engage in interstate commerce. The case in controversy comes squarely within the principle laid down by this Court in the authorities above referred to.

The only other question, therefore, that would seem to be open is: Is the question at issue in this controversy justiciable? In other words, applying the rule laid down by Mr. Justice Brewer in *Kansas v. Colorado,* the jurisdiction "must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the nation no matter who may be the parties thereto."

That action by a State prohibiting, interfering with or imposing a burden upon interstate commerce, or impairing the obligations of contracts, or taking property without due process of law, or denying to citizens of other States the privileges and immunities granted to its own citizens, presents questions justiciable under the Constitution and laws of the United States has been decided by this Court again and again. There are hundreds of such cases in the reports of the decisions of this Court. The questions presented by the complaint, and the questions raised by the answer, in the case in controversy, are therefore justiciable questions. That

the State of Pennsylvania acting under authority of and by virtue of directions contained in the resolutions adopted by the legislature of that State, approved by the Governor, to take such action as *parens patriae* and trustee of its people as the officials of that State deemed proper, has the right to maintain such action, has been adjudicated by this Court in the foregoing authorities. If such State has no such right to proceed, then are millions of its citizens affected in their lives, health, comfort, convenience and property wholly without remedy. None of them under the Eleventh Amendment could institute a proceeding against the State of West Virginia to have this law declared unconstitutional. Before the Eleventh Amendment was adopted such a suit could have been maintained by individual citizens, and this Court would have had jurisdiction because a justiciable question was presented. Why then may not the State, as the representative of the welfare of its citizens, whose lives and health are threatened, maintain such a suit, and is the question thus presented any the less justiciable? It is just such a situation as is presented in this controversy which, before the adoption of the Constitution, would have led to embargoes and reprisals. perhaps war.

As graphically stated by Mr. Justice McKenna, in *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229, of a statute which attempted by indirection to prohibit interstate commerce in natural gas:

> "If the States have such power a singular situation might result. Pennsylvania may keep its coal, the Northwest its timber, the mining States their minerals, and why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out.

To what consequence does such power tend? If one State has it all states have it; embargo may be retaliated by embargo and commerce will be halted at state lines."

The foregoing argument has taken no account of what ought to be a complete answer to this question of jurisdiction. The State of Pennsylvania, as shown by the bill of complaint and by the proofs, as the owner of a large number of State institutions, using natural gas, as well as through its municipal subdivisions using natural gas—all under contract—are directly and in its own interest pecuniarily and otherwise interested in this controversy. On that account alone it has the right to maintain this suit for the protection of those rights, whether or not any of its citizens or people were likewise so interested. It will not do for the State of West Virginia to attempt to brush aside this interest with the statement (page 75, defendant's brief of argument):

> "The substantial ground upon which the plaintiffs sue is the individual grievances of their citizens sought to be redressed by the plaintiffs in their character of *parens patriae*. Subsidiary and trifling in comparison are their complaints of shortage of gas in municipalities and public institutions."

True it is that comparing the property rights of the State involved in this controversy with those rights of its citizens, the losses by the State of Pennsylvania would be out of proportion (but not even then "subsidiary and trifling"), aggregating perhaps only a few millions of dollars, as compared with hundreds of millions, and that in comparison with the lives, health, comfort and convenience of the millions of its citizens, the lives, health, comfort and convenience of only some

thousands of the wards of the State would appear disproportionate. Nevertheless the State has the right, and it is its duty, to protect the lives, health, comfort and convenience of these its own particular wards, though they aggregate but a few thousand. In fact, it owes to them a peculiar duty of protection, because they were so unfortunate as to have become State wards. So, too, the State has the right to protect its own property interests.

The argument (Defendant's brief, p. 75), "that while sovereign States have sued, these cases are controversies between West Virginia and certain gas companies," is wholly gratuitous. There is not a scintilla of evidence to justify this statement. It impugns the honesty and integrity not only of the Governor, the Attorney General, and other State officials, but of the members of the legislature of Pennsylvania which by unanimous action passed resolutions directing the State officials to institute this action.

In the bill of complaint Pennsylvania specifically sets forth that as party complainant it brought its suit for the protection of its own rights and interests, and in its own behalf, as well as in its representative capacity. Considered solely with reference to the protection of the rights and interests of the State as a State, complainant would have the same standing in this suit as a private party to demand the protection of those rights. That the value of the property, directly owned by the State, and the number of its own peculiar wards, the lives and health of whom the State is taking this action to protect, are so much less in comparison with the property rights of its people and their numbers, the lives and health of whom the State is taking this action to protect, naturally casts into shadow the direct inter-

tests of the State. Considered alone, however, those direct interests would be great and important enough to engage the attention of this Court or any other judicial tribunal in the world.

Treating the cases as brought by complainant in its representative capacity, it is respectfully submitted that this Court has jurisdiction of this controversy, whether the question of jurisdiction be tested by the principles laid down by this Court, by the principles upon which our government was established, or by the universal rule of construction of considering the mischief and the remedy. Thus, as has been shown, this Court laid down the general principle *"if the health and comfort of the inhabitants of a State are threatened the State is the proper party to represent and defend them," "as parens patriae, trustee, guardian or representative of all or a considerable portion of its citizens."*

There was a still broader principle enunciated by this Court, applicable to the present controversy, when this Court said the jurisdiction *"must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the nation, no matter who may be the parties thereto."*

There is still another foundation of jurisdiction, comprehensive and far-reaching, referred to by this Court in *Kansas v. Colorado, supra*. That ground involves the fundamental considerations upon which this nation was formed. It was said by this Court, through Mr. Justice Brewer, in the above stated case, (page 80):

> "It is well, therefore, to consider the foundations of our jurisdiction over controversies between States. It is no longer open to question that by

the constitution a nation was brought into being and that that instrument was not merely operative to establish a closer union or league of States."

After referring to the enumerated legislative powers, as contrasted with the entire judicial power, granted to the nation, this Court laid down the principle that the judicial power of the nation extended to all controversies justiciable in their nature, the parties to which, or the property involved in which, may be reached by judicial processes, etc.

That the question involved here, if this suit had been brought by a private party, is justiciable, to wit, an inquiry as to whether a statute is in violation of the Constitution,—is shown by the hundreds of cases in this Court in which those questions have been considered and decided. That they should be justiciable as between States, the same as between private parties, would seem to follow. Why may not one of the States of the Union complain in this Court of another State of the Union enacting a statute in violation of the very agreement which created this Union, bound the States together, and gave jurisdiction to this Court to enforce that agreement. If the jurisdiction of this Court is tested by the general rule of construction to consider the mischief, and then the remedy by which the same is to be removed, again every reason appeals for the retention of jurisdiction. The power to negotiate and contract, make reprisals, establish embargoes, and resort to force, was taken away from the States by the Constitution. In place thereof, jurisdiction in this Court was substituted. The usual procedure if the States had remained sovereign, and West Virginia had passed the statute in controversy,—a statute claimed by Pennsylvania to grievously affect its inhabitants,—would

have been, first, protestations and then negotiations; this failing, reprisals by one embargo and then another. Perhaps total exclusion of all intercourse would have followed, or a wall of customs duties established. West Virginia would no doubt have retaliated; result, ultimately war. But Pennsylvania can neither negotiate, contract, establish embargoes, institute reprisals, or resort to force. Its only remedy, provided by the Constitution, is suit in this Court.

If this Court under the facts of this case, has no jurisdiction, then, notwithstanding surrender by the States to the Nation of the power to protect their people, the people of the State are at the mercy of any State which influenced by selfish or mistaken policy enacts a law, frankly in conflict with the Constitution of the United States. If under such circumstances a State cannot sue a State in this court, the people cannot sue a State anywhere under the Eleventh Amendment, and therefore a law frankly in conflict with the Constitution can be enforced by the enacting State, though it inflicts the loss of life, health and property upon the citizens of sister States.

III.

IS THE ALLEGED OBLIGATION OF THE PUBLIC SERVICE GAS COMPANIES IN WEST VIRGINIA (AUTHORIZED BY CHARTER TO SUPPLY GAS IN WEST VIRGINIA AND ELSEWHERE) TO FURNISH WEST VIRGINIA CONSUMERS WITH A REASONABLY ADEQUATE SUPPLY OF GAS, SO MANDATORY AND PREFERENTIAL THAT THEY ARE COMPELLED TO OBSERVE THIS OBLIGATION AS SUPERIOR AND PRIOR TO THEIR OBLIGATIONS AS TRANSPORTERS OF SAID GAS IN INTERSTATE COMMERCE, AND CAN THE STATE OF WEST VIRGINIA, CONSEQUENTLY, EVEN WHEN THE GAS IS IN TRANSIT IN INTERSTATE COMMERCE, COMPEL THESE INTERSTATE TRANSPORTATION COMPANIES TO DIVERT THIS GAS FROM SAID INTERSTATE TRANSPORTATION IN ORDER TO FURNISH THIS ADEQUATE SUPPLY TO CONSUMERS IN WEST VIRGINIA?

This question involves the consideration of:

1st. What is the obligation of public service natural gas companies to the State of West Virginia?

2nd. When does this natural gas, after being reduced to possession, enter into the stream of interstate commerce?

3rd. If in conflict, which is paramount,—obligations under the constitution and laws of West Virginia, or obligations under the constitution and laws of the United States?

Apply this contention of the State of West Virginia to a public service company engaged in the business of transporting coal, such as a railroad company. The railroad company is a public service corporation in the State of West Virginia, the same as a natural gas company. It owes to the State the obligation adequately to serve the public of West Virginia. It has the right of eminent domain and the right of condemnation of rights of way, the same as a natural gas company. It must be assumed that those rights are granted on condition (as argued in the brief of defendant with reference to natural gas companies) that the corporation furnishes this adequate service to the public of West Virginia. Could the State of West Virginia demand, and by statute compel, the railroad company to adequately supply cars to all of the public of West Virginia along its lines, even if thereby the railroad company was prevented from carrying freight in transit to points outside the State?

Again, apply the contention to an oil pipe line company transporting oil from West Virginia into other States. The pipe line company has the right of eminent domain, condemnation, etc., and owes as a public service corporation the same obligations to the State as does a natural gas company. Could the state by statute compel delivery to the refineries in West Virginia along the line of this pipe line company of the oil in the pipe lines which was in transit to points beyond the State until such refineries had obtained an adequate supply, if the effect thereof would be to prevent the delivery to refineries outside the State of the oil in transit to them under contract for delivery?

To maintain the position of West Virginia there must be some State Divinity, heretofore unknown to the law, which doth hedge this natural gas about, and which is applicable to no other product of the State.

1st. What Is the Obligation of Public Service Natural Gas Companies to the State of West Virginia?

It is not proposed to repeat here the argument under VII (a), pages 94 to 104 of the brief of the State of Pennsylvania, heretofore filed. Brief reference will be made to additional authorities, and some of the authorities cited by defendant will be analyzed so as to show their inapplicability.

Act of 1891, Chap. 113; West Virginia Code, Chap. 52, Sec 24, provides:

> "that a company organized for the purpose of transporting natural gas, petrolem or water * * may enter upon any land for the purpose of examining and surveying a line for its tubing and pipes, and may appropriate so much thereof as may be deemed necessary * * such appropriations shall be made and conduced in accordance with the law providing for compensation to the owners of private property taken for public use * * * . Such company shall, for the purpose of transporting natural gas, oils and water, be considered and held to be a common carrier, and subject to all the duties and liabilities of such carriers under the laws of this State."

Code of West Virginia, Ch. 42, Sec. 20, provides that where a public utility desires to condemn a right

of way and objection is made to the valuation placed upon the land by the Commissioners, such public utility shall have the right to enter upon the premises and commence its work upon paying into court the sum ascertained by the report of the Commissioners. However, as to "a pipe line company organized for the purpose of transporting carbon oil or natural gas, or both, by means of pipes or otherwise", such companies, instead of paying into court the sum ascertained by the report of the Commissioners, may elect to give bond for such sum, and thereupon may enter upon the premises and proceed with the laying of their line.

The business of these companies was twofold:

1st. Transporting and supplying gas in the State of West Virginia, constituting but a small percentage of their business, as admitted by the defendant.

2nd. Transporting gas through the State of West Virginia to markets in other States, which was and is their principal business, as contended by the defendant. (It assigning from 74% to 80% to export; Defendant's brief, page 19).

In the brief of the State of West Virginia attention is called to certain petitions filed by certain natural gas companies in condemnation proceedings in West Virginia, to show that these companies intended to use such lines to supply gas to the public in West Virginia. An examination of such petitions, however, shows that the petitioning company named those cities, towns or localities to which it was supplying gas, which it had of its own accord undertaken to supply, or that the petition was for the purpose of building a transportation line, in accord with the powers granted to such companies in their charters and in Chapter 52, Sec. 24, quoted above.

On page 89 of its brief the State of West Virginia states:

> "That these companies would have received the above special rights and privileges except upon the terms of affording adequate service to the public of West Virginia, or in contemplation of the subordination of that service to that of the people of other States, is unthinkable."

This statement ignores the chronology of events. The statute granting these powers was passed in 1891, over 30 years ago. The charters to these gas companies gave them the right to produce, transport and supply gas not only in West Virginia, but *"elsewhere."* Two of the largest of these companies, The Manufacturers Light & Heat Company and the Carnegie Natural Gas Company, were chartered by other States and were engaged in the natural gas industry in other States, and came into West Virginia to get a supply of gas for those other States as well as for such consumers as they might thereafter obtain in West Virginia.

As stated in the brief for the State of West Virginia, speaking of the inception and growth of this transportation of gas for consumption in other States, (page 16):

> "No program of conservation was adopted or attempted, nor were efforts made to restrict the enormous and continually increasing volume of gas which, in later years, certain of its public service corporations transported, or sold for transportation, to consumers in other States. The right of these public service corporations so to dispose of their surplus in other States was not only recognized, but substantially sanctioned by permitting

them to exercise the power of eminent domain for the construction of pipe lines transporting chiefly for foreign consumption."

While this statement in the brief has the qualification that it was,

"subject only to the duty of first serving West Virginia consumers in the territory through which such lines extended."

this qualification begs the whole question at issue. The quotation is given for the facts admitted. The qualification is an argument only.

The evidence shows that at this time the enormous production of gas in West Virginia was far in excess of any demand in West Virginia, and this encouragement to the natural gas companies engaged in transportation to other States was an inducement to invest millions upon millions of dollars to develop the resources of the State. This, as has already been shown, resulted in great benefit to the State.

Oil companies were given the same powers and privileges for the same reasons, which resulted, in like manner, in the development of the oil territory of the State, to its great advantage.

It will be noted that the statute refers to companies engaged in the business of *transporting*. In no single sentence is the word "supplying" or "furnishing" even mentioned.

These companies were made common carriers under the statute. The statement of West Virginia, on page 90 of its brief, that "these companies * * * refuse to transport for other producers gas which might serve the

public in West Virginia," is wholly gratuitous, because not supported by a scintilla of evidence. It may be that the use of such companies as common carriers of gas may not be usual, but that may be explained by the peculiarities of the transportation of natural gas. Unlike coal or other commodities, gas cannot be taken out of the pipe line at a certain destination and put into cars, tanks, barrels, or on a platform. The consignee at destination must have a pipe line system, compressors, etc., and a market for its distribution.

The proposition that these natural gas companies, because public utilities, owe to the State of West Virginia the obligation of furnishing a reasonably adequate supply "for public use within the territory of this State," or if these words of the statute be disregarded or restricted and this obligation be construed "for the use of the public and every part of the public within the territory of this State in or from which such gas is produced or through which said gas is transported or which is served by such person," must be supported in one of three ways:

(a) By the common law.

(b) By statutory obligation.

(c) By the charter of the company.

(a) *No Such Obligation as that Claimed Exists at Common Law; the Statute Enlarges the Territory to be Supplied.*

That this obligation, thus enlarged, is not a common-law obligation has been shown by the authority of this and other courts in the brief of the Commonwealth of Pennsylvania, pages 94 to 103, and will not be here

repeated. The authorities cited to the contrary in the brief of the State of West Virginia do not sustain its contention, with the exception of the forced construction put upon the case of *Gas Company v. Swiger.* That decision is not binding upon this Court for two reasons:

(a) The particular statement in the opinion quoted in defendant's brief was mere dicta not directly involved in the issues before the Court.

(b) The courts of the United States are not bound by the decision of a State court as to what is or is not the common law of that State, but will decide that question according to their own judgment, as was said by this Court in *Smith v. Alabama,* 124 U. S. 465:

> "A determination in a given case of what that law (the common law) is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular State. This arises from the circumstance that the courts of the United States in cases within their jurisdiction where they are called upon to administer the law of the State in which they sit or by which the transaction is governed, exercise an independent though concurrent jurisdiction and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of *Railroad Company v. Lockwood,* 17 Wall. 357. The common law prevailing in the State of New York with reference to the liabilitiy of common carriers for negligence received a different interpretation from that placed upon it by the judicial tribunals of the State."

In *Gas Co. v. Swiger,* 72 W. Va. 557, relied upon by the State of West Virginia, it was said by Judge Miller, delivering the opinion of the court (as quoted with the asterisks from the brief of the State of West Virginia, p. 91):

> "We observe that the Legislature, by general law, has conferred upon pipe-line companies, organized for transporting oil and natural gas, the right of eminent domain, and has thereby necessarily imposed upon them, as public service corporations, the right and duty of performing a public service. That right and duty is fixed as firmly as if written into the statute. * * * Pipe-line companies organized for transporting gas must serve the public with gas, under reasonable and proper regulations, along the entire line traversed, and for reasonable rates fixed by themselves or by statute, or by contracts or ordinances of municipalities. * * The rights of the people are thus protected in nearly every case where the public is served by public service corporations, furnishing water, gas, electricity, or transportation."

(Citing *Charleston Gas Co. v. Lowe,* 52 W. Va. 662; *Hydro-Electric Co. v. Liston,* 70 W. Va. 83; *Calor Oil & Gas Co. v. Franzell* (Ky.) 109 S. W. 328; *Olmstead v. Morris Aqueduct,* 47 N. J. L. 311; *Gibbs v. Consolidated Gas Co.,* 130 U. S. 396; *Munn v. Illinois,* 94 U. S. 133).

Taking those words of Judge Miller with their context and inserting the omitted words shown by the asterisks, it will appear that what Judge Miller was referring to was that the public use must be fixed and definite and on terms and charges fixed by law. The whole paragraph (72 W. Va. 571) is as follows:

"On the first proposition, that the public use must be fixed and definite, and on terms and charges fixed by law, we observe first, that the legislature by general law has conferred upon pipe line companies, organized for transporting oil and natural gas, the right of eminent domain, and has thereby necessarily imposed upon them, as public service corporations the right and duty of performing a public service. That right and duty is fixed as firmly as if written into the statute. Pipe lines for transporting oil must carry oil, as railroads must carry passengers and freight, at reasonable rates, if such rates are not fixed by statute. Pipe line companies organized for transporting gas must serve the people with gas, under reasonable and proper regulations, along the entire line traversed, and for reasonable rates fixed by themselves, or by statute, or by contracts or ordinances of municipalities. Are not the rights of the public so fixed sufficiently definite to answer the requirements of the law? We think so. The rights of the people are thus protected in nearly every case where the public is served by public service corporations, furnishing water, gas, electricity, or transportation. *Charleston Gas Co. v. Lowe, supra*, and *Pittsburgh Hydro-Electric Co. v. Liston*, 70 W. Va. 83, recent decisions of this court support these conclusions. *Calor Oil & Gas Co. v. Franzell* (Ky.) 109 S. W. 328, as well as *Olmsted v. Proprietors of the Morris Aqueduct*, 47 N. J. L. 311, are likewise in point. So also are the cases of *Gibbs v. Balt. Gas Co.*, 130 U. S. 396; *Munn v. Illinois*, 94 U. S. 133."

In other words, as gas transportation companies are made common carriers by the statute, they must

serve the public with gas along the entire line by receiving same for transportation and transporting and delivering the same for reasonable rates, like railroads and oil pipe line companies.

However, all of this is mere dicta. The issues involved in that case were the condemnation of a right of way under the statute, the construction of the provisions of the statute as to giving bond, and whether or not the pipe line company was a public service corporation. The extent of its powers and obligations as a public service cororation were in no sense, directly or indirectly, involved.

The cases cited by Judge Miller to support his proposition are not in point, if the excerpt be interpreted as claimed by defendant, and some of them are to the contrary.

The first is *Charleston Gas Co. v. Lowe*, 52 W. Va. 622. The court there held that it was the duty to furnish gas to the people within the city who applied therefor, because the municipality had granted the franchise to the gas company for the purpose of supplying the people of that city, and the gas company had accepted the same.

The next case is *Hydro-Electric Co. v. Liston*, 70 W. Va. 83. This case was decided under the express provisions of a statute which provided that electric companies occupying highways under the Act should furnish electric service to all persons upon its lines desiring same. Here was an express statutory requirement for the supply of service along the lines.

The next case is *Calor Oil & Gas Co. v. Franzell* (Ky.), 109 S. W. 328. That case arose under condemnation proceedings, and contains nothing whatever supporting the proposition of Judge Miller.

The next case is *Olmsted v. Morris Aqueduct,* 47 N. J. L. 311. This was also a condemnation proceeding under a statute which gave the water company the right to extend its mains outside and beyond the corporate limits of the city or town which it was supplying. It contains nothing whatever to justify the statement of Judge Miller.

The next case is *Gibbs v. Consolidated Gas Co.,* 130 U. S. 395. That case involved the question of a contract to prevent competition and create a monopoly in the supply of gas to the city of Baltimore, and neither directly nor indirectly sustains the statement of Judge Miller.

Munn v. Illinois, 92 U. S. 133, the last case cited by Judge Miller, need not be analyzed to this Court to show that it is no authority for the statement of Judge Miller.

The misapplication of the authorities quoted or referred to in the brief of the State of West Virginia is well illustrated by a citation, (Defendant's brief, page 94), from Mr. Justice Clarke, in *New York v. McCall,* 245 U. S. 345. The language quoted is as follows:

> "Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve, and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render."

In the above case the company had a franchise to supply the inhabitants of the Third Ward of the Borough of Queens, New York. What this Court decided was that having accepted the franchise for that district it had undertaken the duty to supply the inhabitants of that district, and was therefore obligated to render adequate service to such inhabitants and extend its lines accordingly, and is not an authority for the purpose cited by the defendant.

This Court's attention is particularly directed to the fact that the statute in controversy expressly enlarges the territory to be served by the gas company over that which "is served by such" company. The statute reads:

> "furnish for public use within the territory of this state and for the use of the public and every part of the public within the territory of this State in or from which such gas is produced, or through which said gas is tranported or *which is served by such person.*"

In other words, the statute provides that the company must, in addition to the territory "which is served by such person," also serve all the other territory described, whether the gas company has devoted its property to this service or not.

That a state has no such power was held in *Atch., T. & S. F. R. R. Co. v. Railroad Commission of Cal.*, 173 Cal. 577; 2 A. L. R. 975, at page 980; *et seq*:

"Again, in *Del Mar Water, Light & P. Co. v. Eshleman*, 167 Cal. 666, 680, 140 Pac. 597, Mr. Justice Shaw, said: 'But even a constitutional declaration cannot transform a private enterprise, or a part thereof, into a public utility, and thus take property for public use without condemnation and payment. The provisions of this Act could not authorize the Commission to compel such corporation to dedicate additional property to public use without additional compensation. When a corporation voluntarily devotes a part of its property to public use, it is to be presumed that it makes the dedication because it is satisfied with the return which it expects to receive and in that way it is deemed to have been compensated for such dedication. But when it is forced to devote to public use additional property which it has not dedicated to public use, or is compelled to extend its service to supply uses or territory not embraced in the original dedication, it must under our constitutional provisions, as a condition precedent, be compensated for the value of the new property taken or new use exacted. This may be done under the power of eminent domain.' * * * * .

A public utility, undertaking to supply a given public need, submits itself to the regulation and control of public authority with respect to the service which it has thus undertaken. * * * * *. But to require a public utility to devote its property to a service which it has never professed to render is to take that property, *pro tanto*, and such taking cannot be justified except under the power of eminent domain—i. e. upon just compensation."

The *Del Mar v. Eshelman* case, in 167 Cal., cited and relied upon in the above citation from the Supreme Court of California, is cited with approval and followed in *Van Dyke v. Geary*, 244 U. S. 39, by this Court in an opinion by Mr. Justice Brandeis.

(b) *The Statute Law of West Virginia, Before the Passage of this Statute in Controversy, Imposed no Obligation Upon These Natural Gas Companies of Furnishing a Reasonably Adequate Supply "For Public Use Within the Territory of this State," or, if These Express Words of the Statute be Disregarded, "For the Use of the Public and Every Part of the Public Within the Territory of This State in and From Which Such Gas is Produced or Through Which Said Gas is Transported, or Which is Served by Such Person."*

There was no statute in the State of West Virginia which purported to impose in any manner such a requirement until the statute in controversy was passed. There was such a statute relating to telegraph, telephone and electric light and power companies. (Ch. 13, Act 1907, reenacting Section 2, Ch. 4, Code of W. Va. 1899). This however was subsequently repealed.

As has already been argued, when the statutes relating to oil and gas transportation companies were passed, the State of West Virginia was anxious to encourage the development of the oil and gas industry in said State, by the transportation of oil and gas out of the State, and, accordingly, the rights and privileges to natural gas and oil transportation companies were granted without any restrictions whatever.

Under the authority cited in the original brief of the State of Pennsylvania (pages 94 to 103), and hereinabove, it has been shown that there was no such obligation under the common law, and there is no statute which so pr ided. This obligation, therefore, if any such exists, must be sought in the charters of these gas companies.

(c) *The Charters of The Gas Companies do Not Provide or Imply That These Natural Gas Companies as Public Utilities Owe to The State of West Virginia the Obligation of Furnishing a Reasonably Adequate Supply "For Public Use Within the Territory of this State," or if These Words of the Statute be Disregarded "For the Use of the Public and Every Part of the Public Within the Territory of this State in and from Which Such Gas is Produced or Through Which Such Gas is Transported or Which is Served by Such Person."* ......

It is significant that the State of West Virginia did not put in evidence the charters of these respective companies, to maintain its contention that these companies, or any of them, under their charters were so obligated. The State of West Virginia did put in evidence certain petitions in condemnation proceedings by some of these companies, which recited certain provisions of the charters and showed that the company was chartered to produce, transport and supply gas in West Virginia and "*elsewhere.*" In almost all cases in these petitions the towns, cities or municipalities in West Virginia that were being supplied by said companies were named and specifically set forth. Two of the companies, in fact among the largest, were Pennsylvania corporations—the Carnegie Natural Gas Company and The Manufacturers Light & Heat Company—and when they entered West Virginia they then had plants and property and

supplied consumers in other States. No inference as to charter limitation can be drawn by the State of West Virginia against those companies whose charter rights have not been specifically set forth in evidence by the State of West Virginia. Some of them have already been before this Court, as the United Fuel Gas Company—containing the same provision in its charter as to supplying gas in West Virginia *"and elsewhere."*

Whatever may have been the charter powers or privileges, however, something more is required than the right or privilege or permission *in the charter* to supply certain or general territory. It must be shown either (a) that such provisions in the charter are mandatory, not merely permissive, or (b) that the company has actually engaged in the service, before such companies can be compelled to supply even the territory named in the charter.

In the case of *Northern Pacific R. R. v. Dustin*, 142 U. S. 492, this Court, by Mr. Justice Gray, said (p. 498):

> "If, as in *Union Pacific R. R. v. Hall*, 91 U. S. 343, the charter of a railroad corporation expressly requires it to maintain its railroad as a continuous line, it may be compelled to do so by mandamus. So if the charter requires the corporation to construct its road and to run its cars to a certain point on tide-water (as was held to be the case in *State v. Hartford & New Haven Railroad*, 29 Conn. 538) and it has so constructed its road, and used it for years, it may be compelled to continue to do so. And mandamus will lie to compel a corporation to build a bridge in accordance with an express requirement of a statute. *New Orleans etc. Ry. v. Mississippi*, 112 U. S. 12; *People v. Boston & Albany Railroad* 70 N. Y. 569.

But if the charter of a railroad corporation simply authorizes the corporation, without requiring it, to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by mandamus to complete or to maintain its road to that point, when it would not be remunerative. *York & North Midland Railway v. The Queen*, 1 El. & Bl. 858; *Great Western Railway v. The Queen*, 1 El. & Bl. 874; *Commonwealth v. Fitchburg Railroad*, 12 Gray 180; *State v. So. Minnesota Railroad*, 18 Minn. 40."

Where a charter is permissive and not mandatory, and there is no obligation either by contract or by profession or offer of service to enter upon those permissive services there is no unrestricted or uncontrolled power or authority at law to require such corporation to perform such public services.

See *Towers v. United R. & Elec. Co.*, 126 Md. 478.

Public Service Comm. v. Phila., B. & R. Co., 122 Md. 438.

Scranton v. Scranton R. Co., P. U. R. 1915 C 890.

This principle of law was applied to a natural gas company, and shown to be peculiarly applicable, in *Fidelity Title & Trust Co. v. Kansas Natural Gas Co.*, 219 Fed. 614 (1913). In that case, Marshall, D. J., at page 616, said:

"But what are the limits of the duty to the state or public? There was no specific contract or charter provision, no exclusive right granted so as to imply a contract to supply the full needs of those dependent on the monopoly and for whose

interest the grant was made. The action of the state was only permissive. The company was not obligated to build any pipe line or to furnish any gas. So far as it availed itself of this permission, its property used for the quasi-public service was affected by the public interest, and its use of the property in this business was subject to valid state regulation, but it did not become a mere agency of the state, and was under no obligation, contractual or other, to increase its investment or build new lines. It did not manufacture gas. It purchased wells and transported gas by pipe line. These wells were gradually exhausted. The lines were exteneded and more distant wells obtained until the system extended into several states. The security of the bondholders is constantly dissipated by the consumption of the property, and this method has led to the insolvency of the corporation. If by its entry into Kansas the company entered into an obligation to constantly buy new wells and extend its lines to new gas fields so as to constantly furnish to the cities of Kansas an adequate supply of gas, the security of the bondholders was, indeed, illusory. The undertaking was one necessarily ending in bankruptcy.

It is well settled that a railroad company chartered to build a particular line under a permissive charter is not liable to the state for a failure to build it, and that only so far as it does build is its property affected by th. public interest. *York etc. Ry. v. Regina*, 1. El. & Bl. 858, 864; *Edinburgh, etc. Ry. Co. v. Philip*, 2 Macqu. App. Cas. 526; *State v. So. Minn. R. R. Co.*, 18 Minn. 40 (Gil. 21); *Weymouth v. Penobscot Log Driving Co.*, 71 Me. 29. And *a fortiori*, that such a company cannot be required to construct a new or branch line. I know of no raeson why this well-settled principle is not applicable in this case."

The absurdity of any contrary principle cannot be better illustrated than by the case under consideration. The charters in evidence provide for the supply of certain territory in West Virginia "and elsewhere." Could any community in the States of Pennsylvania, Ohio, New York, or adjoining States to West Virginia, or elsewhere, because these companies had charters to supply gas "elsewhere", compel them to extend their lines throughout Pennsylvania, Ohio, New York, Kentucky, Indiana, or even from Maine to California?

In the decision of the court in *Del Mar Water etc. Co. v. Eshleman*, 167 Cal. 666 (1914), (which is cited with approval by this Court in *Van Dyke v. Geary*, 244 U. S. 39), a thorough discussion of this question is given. It is too long to quote at length.

> "The fact that the articles of incorporation empower the company to engage in public service does not, of itself, constitute proof that it is engaged in such public service, or that it has dedicated such property as it may own to such public service. * * * The only effect of the adoption of such articles by a corporation is to give it the capacity to engage in such public service if it so desires. After having become incorporated in this manner, it has the power to engage in such service in the same sense that an individual has power to engage in such service. It may or may not do so, and until it does, it cannot be said to be subject to the jurisdiction of the railroad commission."

2nd. When Does Natural Gas, After Being Reduced to Possession, Enter into the Stream of Interstate Commerce?

Among the priceless gifts of nature to man, natural gas has been one of the most valuable. But the rights of property therein are peculiar. As said by this Court in *Oil Co. v. Indiana*, 177 U. S. 190:

> "The owners of the surface of the land within the gas field, whilst they had the exclusive right on their own land to sink wells for the purpose of extracting the oil and gas, had no right of property therein until by the actual drawing of the oil and gas to the surface of the earth they reduced these substances to physical possession."

Wandering hither and thither, disregarding property and State lines, they have been likened to animals *ferae naturae*, but in the case above quoted the want of identity of the rules of law applicable to oil and gas and to animals *ferae naturae* was clearly distinguished. The right of the public to reduce to possesion natural gas, like animals *ferae naturae*, was denied. When natural gas is once reduced to possession, as has already been shown by the authority of this and other courts (Brief filed by State of Pennsylvania) it becomes a commodity of commerce, intrastate or interstate as the case may be. After being reduced to possesion gas is always in motion on its way to market. When the shell which in all cases overlies the strata in which Nature has deposited this gas, and through which it flows, is pierced with the point of the drill of the person who has the legal right to reduce this gas to possession, the gas rushes by its power of expansion up through the tubing and casing of the well and into the line

of the natural gas company on its journey to market. As was said in the natural gas primer issued by the Smithsonian Institution, approved by George H. Ashley, State Geologist of Pennsylvania, at page 7:

> "The gas is never at rest, but is a constantly seething, moving mass, traveling in the mains at enormous velocities—at a speed many times exceeding that of the fastest trains—and requires constant attention at the well and until it is burned at the consumer's fixtures."

If it flows into the lines of one of these companies engaged in the business of supplying consumers in other States, (the large bulk of the gas in the lines being so destined for export,) then, even though such company also supplies from its lines a comparatively small percentage of this gas to consumers in the State of West Virginia, nevertheless this gas so entering the lines is in interstate commerce. Moreover, as has been shown, there being no absolute property in this gas until it is actually reduced to possession, and when it is actually reduced to possession it having been committed to interstate commerce, there is no period or time when the State of West Virginia could lay its hands upon it so as to burden, interfere with or prevent its transmission in such interstate commerce.

The decision of this Court on December 12, 1921, (not yet reported) Mr. Justice Holmes delivering the opinion, *United Fuel Gas Co. v. Walter J. Hollanan et al.*, thus refers to this interstate transportation:

> "In short the great body of the gas starts for points outside the State and goes to them. That the necessities of the business requires a much smaller amount destined to points within the State

to be carried undistinguished in the same pipes does not affect the character of the major transportation. Neither is the case as to the gas sold to the three companies changed by the fact that the plaintiff, as owner of the gas, and the purchasers after they receive it might change their minds before the gas leaves the State and that the precise proportions between local and outside deliveries may not have been fixed, although they seem to have been. The typical and actual course of events marks the carriage of the greater part as commerce among the States and theoretical possibilities may be left out of account. There is no break, no period of deliberation, but a steady flow ending as contemplated from the beginning beyond the State line. *Ohio R. R. Commission v. Worthington*, 225 U. S. 101, 108; *United States v. Reading Co.*, 226 U. S. 324, 367; *Western Union Telegraph Co. v. Foster*, 247 U. S. 105, 113."

This United Fuel Gas Company, which was a party to that case, is one of the seven companies referred to in the answer and brief of the State of West Virginia in the case at bar. All of the evidence in that case, as to the matters referred to by this Court, and more, is in the record in this case. In fact, under the evidence in the record before this Court in this case some of the great interstate companies occupy even a stronger position than the United Fuel Gas Company as to their interstate business.

It is not claiming too much to contend that the very instant this gas is reduced to possession by the strata being tapped by the drill, it is destined for and committed to interstate commerce. The facts have a language of their own. They speak in terms admitting

of no contradiction. If, as is conceded by the State of West Virginia, the seven great interstate companies referred to on page 21 of the brief of the State of West Virginia, sold from 1911 to 1919 inclusive, to consumers in West Virginia, only from 11% to 17% of their net supply, and the balance was transported by these companies for consumption in other States, then it follows inevitably that from 83% to 89% of this gas was at some time while in the State of West Virginia in course of transportation or transmission from the State of West Virginia to other States, and then and there committed to interstate commerce. In other words, as shown by the uncontradicted evidence, the vast bulk of the gas in the lines of these companies is in interstate commerce; or as stated by Mr. Justice Holmes, "The great body of the gas starts for points outside the State and goes to them," under contracts for the delivery thereof previously made, or to which these companies have been committed by their engagements to supply certain other companies and certain municipalities in other States. And yet the State of West Virginia proposes by the statute in controversy to compel the diversion of this very gas, this great body of the gas which has stared for points outside the State, while in transit to these points outside the State, to the supply of consumers in West Virginia, and to divert and hold it until such consumers in West Virginia shall have obtained an adequate supply, consumers in territory the gas company may never have undertaken to supply, even if thereby, as the uncontradicted evidence shows, all the gas produced in the State of West Virginia will be appropriated under the statute to supply these consumers in West Virginia, thereby preventing and prohibiting the export of any of said gas.

In fact, the State of West Virginia in its Answer claims the right, and sets forth the alleged legal grounds upon which it claims that right, to monopolize this gas. Complainants in their original brief and in this supplemental brief have already argued the unsoundness of this contention.

The *argumentum ad hominem* has been ably, ingeniously and adroitly made on behalf of the State of West Virginia that these seven great interstate companies have acquired so large a proportion of the developed and undeveloped gas territory in the State of West Virginia, that if they continue their present interstate business, consumers in West Virginia, although the gas is produced in the State of West Virginia, will be deprived substantially of all gas for consumption in said State.

As to the utter lack of foundation of allegations of monopoly or combination of the seven companies, sufficient has been said in contradiction and denial, in the original brief on behalf of the State of Pennsylvania.

The enforcement of the principle of non-interference by a State with interstate commerce, provided by the Constitution of the United States, will not lead to the result apprehended, namely, to deprive consumers in West Virginia of the use of natural gas.

It may serve a useful purpose to show from the evidence that this apprehension is a mere figment of the imagination. It may be wise to make this showing for the reasons given by Mr. Justice Holmes in his opinion in the *Northern Securities Case, viz*:

> "Great cases like hard cases make bad law. For great cases are called great not by reason of

their real importance in shaping the law of the future but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful and before which even well-settled principles of law will bend."

Mr. Lakin, a witness for the State of West Virginia (page 1138 *et seq.*, vol. 2, Transcript of Record, who stated his official position to be a member of the State Board of Control of West Virginia, which Board has charge of all the State educational, penal, charitable and correctional institutions) gave a list, on page 1139, of such State institutions and of the companies supplying gas to these institutions. Of these 17 institutions only 5 were supplied by any one of these seven companies, the others being supplied by local companies. This is shown at page 1155 *et seq.*, Transcript of Record. The witness testified that, while the gas service by the local companies was bad, that the service by the interstate companies was good, and that each one of the institutions that was supplied by any one of these seven interstate companies obtained good service. For example, the service of the West Liberty Normal School, supplied by The Manufacturers Light & Heat Company, the witness stated was very good. At the Spencer State Hospital at Spencer, W. Va., supplied by the United Fuel Gas Company, he stated the service was excellent. The service at the Huntington State Hospital, supplied by the United Fuel Gas Company, he stated was excellent. At the West Virginia penitentiary at Moundsville, supplied by The Manufacturers Light & Heat Company, he stated the service was very good. The service at the

West Virginia Industrial Home for Girls, of Industrial, W. Va., supplied by the Pittsburgh & West Virginia Gas Company, he stated has been very good.

Witnesses for the State of West Virginia also admitted (Vol. 2, pp. 1245 to 1250, Transcript of Record) that some of these local companies had a large acreage, one of them about 12,000 acres, of developed territory which it did not drill, and that private individuals had obtained large acreages which they had drilled and were drilling to obtain gas for use in their own plants.

At pages 1347 *et seq.*, witnesses for the State of West Virginia testified that Clarksburg and vicinity were supplied by local companies only, some of which were not public service companies. This is significant because of the testimony of Governor Cornwell that he was influenced to ask the legislature to pass the statute in controversy because of representations of shortage of gas at Clarksburg made to him by manufacturers and consumers of Clarksburg.

At pages 1001, 1002 and 1003, vol. 2, Transcript of Record, a witness for the State of West Virginia gave a table showing the acreage held in West Virginia *by natural gas utilities* on December 31, 1919, there being 48 in addition to the seven companies. This table showed that such local companies held a certain percentage of undeveloped and developed territory, as compared with the seven companies, of about 7% to 93%. Some of these local companies, however, hold large acreages both of undeveloped and developed territory.

Let it be noted, however, that this list and these figures wholly ignore the large amount of gas territory held and developed by individuals, by manufacturing corporations in the State for their own use, and by the

large number of oil companies and oil operators. Such territory so held by others than the natural gas utilities listed by the witness will approximately equal in acreage the amount held by all the gas utilities in the State, certainly the seven companies. (See Vol. 1 Exhibits, pp. 1608 to 1618.)

As was shown by the testimony, gas was being developed and produced from time to time by oil operators and wildcatters (those adventurers who take up a block of leases and drill one or more wells in the hope of finding oil or gas). The gas thus developed or produced is generally sold to the nearest gas line.

Moreover, these seven interstate companies deliver to consumers in West Virginia (see admission in brief of West Virginia, page 21) from about 11% to 18% of their whole production. Figured therefore solely with reference to the West Virginia gas utilities and consumption and deducting from the acreage holdings of the seven companies the percentage devoted to West Virginia, West Virginia would be incomparably better off than any other State. As shown by the evidence, these interstate gas companies furnish satisfactory service, so that the consumers supplied by the seven companies have no cause whatever for complaint. In other words, the shortage of gas complained of, and shown by the evidence of the State of West Virginia, to consumers in West Virginia, was occasioned by the local companies not engaged in interstate commerce, which failed to perform their function as public service companies and not by the seven interstate companies. These local companies had the same or better opportunities for securing leases, drilling wells and purchasing gas from others as had the seven companies. If they failed to embrace their opportunities for want of foresight, business judgment or capital they cannot on this account de-

mand sympathy and the ignoring of the Constitution. Had any of these seven interstate gas companies failed in their function as public service companies to supply communities served by them in the State of West Virginia, they could have been, and no doubt would have been, brought before the Public Service Commission of West Virginia, upon complaint of such communities, or some of their consumers, and orders accordingly demanded. So far as the record shows, and as the fact is, no complaint has ever been made against any of these interstate gas companies on account of any failure to fully and completely perform their public service duties to the consumers in West Virginia, nor is there any evidence that they did not fully and completely perform such duties and obligations. As was shown by the evidence the West Virginia domestic consumers have not only obtained their full proportion of the available supply, but they have been lavishly supplied as compared with all others, consuming twice as much as the consumers in Pennsylvania and five times as much as those in Ohio.

From the foregoing facts it is manifest that the apprehension that all of the gas produced in West Virginia might be taken out of the State to other States and no gas, though produced in the State, supplied to consumers in West Virginia, has nothing to justify it. When the supply of gas shall have become greatly diminished the management of the great interstate companies it must be assumed will be affected by the ordinary rules and usages of trade. Such companies in the natural course of business will find it unprofitable to transport comparatively small quantities of gas long distances, and will seek their markets nearer their sources of supply, namely, consumers in the State of West Virginia.

As stated, this argument is submitted not because complainant believes it affects the determination of the principles of law involved, or that this Court could be swerved from the straight line of judicial application of settled principles of law; yet, as stated by Mr. Justice Holmes, "great cases like hard cases make bad law," and it cannot be harmful to demonstrate that there are no hardships to consumers in West Virginia to be reasonably apprehended from an inflexible enforcement of the constitutional inhibition against State interference with interstate commerce in natural gas.

3rd. If in Conflict, which are Paramount,—Obligations Under the Constitution and Laws of West Virginia, or Obligations under the Consitution and Laws of the United States?

It is unthinkable that an irresistible force can meet an immovable body. Either the power of the State of West Virginia to compel public service natural gas corporations doing business in that State to furnish to consumers in West Virginia a reasonably adequate supply of gas,—whether or not, by so compelling, interstate commerce in natural gas is interfered with, burdened, prevented or prohibited,—is the supreme law of the land; or the power of the United States to enjoin any State, including West Virginia, from interfering with, burdening, preventing or prohibiting, interstate commerce in natural gas, is the supreme law of the land.

Stripped of its dress of rhetorical plausibility, the contention of the State of West Virginia in its nakedness is this: That to enforce the duty of a public service corporation to the State of West Virginia the State

may not only burden and interfere with, but if necessary absolutely prevent and prohibit, the export of natural gas from West Virginia into other States.

It is not always easy to unflinchingly apply even thoroughly established principles of law to a fact situation where such application has a tendency to inflict on one of the parties an apparent hardship. Every case that comes before a court involves a fact situation. Thus, at this instant there is not produced in West Virginia enough natural gas to furnish a reasonably adequate supply to all of the consumers in West Virginia, domestic, industrial and others, who may now and hereafter desire the same, however wasteful may be the uses for which said gas is desired, and at the same time continue the interstate transportation of natural gas to consumers in other States, as has been the course of conduct of the business for over a generation.

Let this condition that now confronts the state be first considered with reference to the admitted fact situation which obtained when this interstate business was undertaken, instead of solely with reference to the situation in West Virginia as it exists today.

Those natural gas corporations that were incorporated in the State of West Virginia were given the right to do an interstate business. Those that were engaged in interstate business when they came into West Virginia were given the right also to do business in West Virginia. The production of gas and its consumption were of great value to the State of West Virginia. There was not enough demand in the State in the earlier stages of the natural gas development to consume but a small portion of the gas there produced. The State of West Virginia encouraged the transportation of this gas into other States, where a market there-

for could be found. It profited greatly thereby. It encouraged, permitted, acquiesced in, and authorized, the expenditure of hundreds of millions of dollars by the interstate gas companies in the development of the gas fields, the laying of pipe lines, and the building up of this interstate business. What the State of West Virginia might have done in the beginning it is not now worth while to consider. Having no title to the natural gas in the ground, and the gas not becoming an article of commerce until reduced to possession by the party having the right so to do, we are not now concerned with what if any power the State had over this gas before it was so reduced to possession.

So, too, whether or not the gas company must satisfy its consumers as they come along, those nearest getting the first service and those furthest away what is left, is not involved in this controversy, because that is what is now being done and the statute in controversy does not seek that end.

The evidence shows that interstate natural gas companies are giving their West Virginia consumers at the present time a reasonably adequate supply.

What the statute in controversy seeks to compel these interstate natural gas companies now to do is to take on in West Virginia other consumers, in territory and districts that they have never heretofore undertaken to supply, to supply to other public service corporations in West Virginia any deficit which exists upon the lines of such other public service corporations, and to discriminate against their consumers in other States in favor of every one in West Virginia who may desire to use gas for any purpose.

The statute does not undertake to equitably and ratably distribute this gas among all the consumers on the lines,—consumers in West Virginia and in other States who came on, if not by the invitation, at least by the sanction and with the approval, of West Virginia, but this statute in the boldest and baldest manner, wholly ignores the rights and claims of consumers in other States, and undertakes to discriminate in the most ruthless and cruel manner against such consumers in other states and to appropriate to the use of all persons in West Virginia who may desire to use the same all the gas produced and transported in West Virginia. In so attempting, not only is there no equity to justify this attempted wrong, but there is law to prevent its successful consummation.

It clarifies the mind, stimulates the reason, and leads to directness of application, to review even thoroughly established and elementary legal principles.

Article VI of the Constitution provides:

> "This Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land * * * anything in the constitution or the laws of any State to the contrary notwithstanding."

It was said by Mr. Justice Harlan, delivering the opinion of this Court in *Northern Securities Co. v. United States*, 193 U. S., at page 335:

> "By the express words of the Constitution, Congress has the power to 'regulate commerce with foreign nations and among the several States, and with the Indian tribes.' In view of the numerous decisions of this court there ought not, at this day, to be any doubt as to the general scope of such power."

He quotes with approval the words of Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 1, 196, 197:

> " * * that such power 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.' "

And again, (p. 345):

> "* * No State can, by merely creating a corporation, or in any other mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce. It cannot be said that any State may give a corporation, created under its laws, authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a State is necessarily subject to the supreme law of the land."

And again (p. 347), referring to the power of the United States over interstate commerce, he continues:

> "* * The court has steadily held to the doctrine, vital to the United States as well as to the States, that a state enactment, even if passed in the exercise of its acknowledged powers, must yield, in case of conflict, to the supremacy of the Constitution of the United States and the acts of Congress enacted in pursuance of its provisions."

While there were dissents of some of the Justices of this Court in the Northern Securities case, none of the dissenting Justices questioned these propositions, but based their dissent upon other grounds.

If, therefore, as the uncontradicted evidence in this case shows, the enforcement of this statute will inevitably result in burdening, interfering with, and in fact preventing and prohibiting, interstate commerce in natural gas by those corporations now engaged in transporting it from West Virginia to other States, then surely it must follow that whatever duty or obligation as a public service corporation any of these corporations owed to West Virginia, which duty or obligation if observed by said corporation, would bring about and cause this burden, interference, prevention and prohibition, such duty or obligation could not be enforced by the State of West Virginia.

Suppose the State of West Virginia had passed a statute which had frankly enacted:

> "All public service corporations, now engaged in West Virginia in the business of producing and transporting gas for export to other States, before exporting the same to such other States, in accordance with the custom and usage authorized and sanctioned by this State for over a quarter of a century, shall deliver to all manner of persons throughout the State of West Virginia who may desire the same, an adequate supply of gas, even though the effect thereof will be to consume all of the gas in West Virginia, and prevent the carriage of any thereof outside of the State."

Would such a law be constitutional? Under the express terms of the statute in controversy and the evidence in this case, wholly uncontradicted, that is substantially what the enforcement of the statute in controversy would effect. That effect is what the State of West Virginia avows in its Answer it seeks by the statute in controversy to accomplish, and declares in its Answer it has the right so to do.

The charm "the obligations to the public of the State of the public service corporations of the State," is the abracadabra by whose magic the State would ward off the power of the Nation and would overthrow the mandate of the Constitution of the United States with a statute of the State of West Virginia. It is submitted that the magic of the charm has been overestimated; it is not so prodigiously potent.

Respectfully submitted,

GEORGE E. ALTER,
Attorney General.
A. LEO. WEIL,
Attorneys for Complainant.

APPENDIX.

Exhibit "A."

A JOINT RESOLUTION

Authorizing action by the authorities of this Commonwealth to prevent discrimination against the citizens of this Commonwealth in the use of natural gas which would result from the law recently enacted by the State of West Virginia.

Whereas There are millions of domestic and hundreds of industrial consumers of natural gas citizens of this Commonwealth who have expended enormous sums of money to equip their houses and plants respectively with appliances adapted for burning this fuel and to restrict and diminish the supply to any considerable extent would affect the domestic consumers in their health, their comfort their convenience and their welfare would subject them to enormous property losses in rendering useless their present appliances and necessitating the substitution of others in many cases requiring the reconstruction of dwellings while the industrial consumers if thus restricted and the supply of gas greatly diminished would not only suffer great loss but be placed at a disadvantage in competition with manufacturers in other States where by law an adequate supply was provided.

And Whereas Citizens of this Commonwealth have invested hundreds of millions of dollars in the exploration for and the development of natural gas wells and fields in the State of West Virginia and in the installation of transportation systems for the transmission of the gas thus found from West Virginia into Pennsylavania in order to obtain a supply for its citizens and to this end have made contracts and entered into obligations with cities and boroughs as well as with industrial plants and others and

Whereas The citizens of said cities and boroughs and the owners of said industrial plants and others are to a large extent dependent upon and have relied for their supply upon the gas transported from the State of West Virginia into the State of Pennsylvania the natural gas available from other sections being wholly inadequate a large proportion of said gas now consumed in Pennsylvania coming from West Virginia and

Whereas In order to restrain and restrict the transmission of this gas from West Virginia into Pennsylvania and to discriminate against the citizens of Pennsylvania and in favor of the citizens of West Virginia the State of West Virginia on the seventeenth day of February one thousand nine hundred and nineteen did enact a law the effect whereof is that the gas produced in said State should be first applied to the full satisfaction of all the domestic, industrial and other demands of the citizens of that State before any thereof could be transmitted into Pennsylvania thus disregarding the rights of citizens of Pennsylvania and the obligations of their contracts and

Whereas By cumulative fines and penalties civil and criminal said law of West Virginia is designed to deter

parties engaged in the production and transmission of natural gas in West Virginia into Pennsylvania from instituting legal proceedings to have tested and adjudicated the right of said State so to restrict and prevent the transmission of gas from West Virginia until after all of the demands of its citizens have been first adequately supplied and

Whereas The citizens of this State who will suffer in their health, comfort, convenience, welfare and property by the enforcement of this law are without remedy or redress except through action by this Comonwealth and

Whereas The enforcement of said law of West Virginia would be in conflict with the Constitution of the United States which inhibits the placing of burdens and restraints upon interstate commerce and prevents laws impairing the obligation of contracts and

Whereas The framers of the Constitution of the United States by the provisions of said Constitution sought to prevent any State from husbanding and applying its natural resources solely for the benefit of its own citizens to the detriment and loss of the citizens of other States well knowing if this policy were pursued it would result in reprisals and all of the evils attendant thereon and vested in the Federal courts the power to prevent any State from entering upon any such course of conduct now therefore

Be it Resolved By the Senate of the Commonwealth of Pennsylvania with the concurrence of the House of Representatives that the Attorney General be and he is hereby authorized and directed to institute such legal proceedings and to do all other acts necessary to protect the rights and interests of the Commonwealth of

Pennsylvania and of its citizens from any and all violation or infringement by the State of West Virginia or by any of its constituted authorities under or in pursuance of said law of West Virginia affecting or intended to affect consumers of natural gas in Pennsylvania.

E. E. BEIDLEMAN,
President of the Senate.

ROBERT S. SPANGLER,
Speaker of the House of Representatives.

Approved—The 18th day of April, A. D. 1919.

WM. C. SPROUL.

In The

Supreme Court of the United States

OCTOBER TERM, 1922.

NOS. 15-16, ORIGINAL.

THE COMMONWEALTH OF PENNSYLVANIA,
Complainant,
vs.
THE STATE OF WEST VIRGINIA, Defendant.

THE STATE OF OHIO, Complainant,
vs.
THE STATE OF WEST VIRGINIA, Defendant.

9

CONSOLIDATED BRIEF FOR DEFENDANT, THE STATE OF WEST VIRGINIA.

EDWARD T. ENGLAND,
Attorney General of West Virginia.
FRED O. BLUE,
GEORGE M. HOFFHEIMER,
PHILIP P. STEPTOE,
WILLIAM S. JOHN,
Counsel for the State of West Virginia,
Defendant.

SMITH BROS. CO. INC., LEGAL PRINTERS, 407-409 GRANT STREET, PITTSBURGH, PA.

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In The

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THE STATE OF OHIO, Complainant,

vs.

THE STATE OF WEST VIRGINIA, Defendant.

Consolidated Brief for Defendant, the State of West Virginia.

Statement of the Cases.

On February 10, 1919, the Legislature of West Virginia enacted the following statute (*W. Va. Acts of 1919*, Ch. 71):

"An Act in relation to persons, firms and corporations engaged in furnishing, or required by

law to furnish, natural gas for public use within this State, to provide remedies for the enforcement of this act and penalties and punishment for violations thereof, and to extend the jurisdiction of the public service commission and of the courts of this State with respect thereto.

Be it enacted by the Legislature of West Virginia:

SECTION 1. That every person engaged in furnishing, or required by law (whether statutory or common law) to furnish, natural gas for the public use, or for the use of the public, or any part of the public, whether for domestic, industrial or other consumption, within this State, shall to the extent of his supply of said gas produced in this State, (whether produced by such person or by any other person), furnish for public use within the territory of this State, and for the use of the public and every part of the public within the territory of this State, in or from which such gas is produced, or through which said gas is transported or which is served by such person, a supply of natural gas reasonably adequate for the purposes whether domestic, industrial or otherwise, for which natural gas is consumed or desired to be consumed by the public, or any part of the public, within said territory in this State, and for which said consumer or consumers therein shall apply and be ready and willing to make payment at lawful rates.

SECTION 2. That in case any person engaged in furnishing or required by law (whether statutory

or common law) to furnish, natural gas for public use within this State, or for the use of the public or any part of the public within this State, shall have a production or supply of natural gas which is, or probably will be, insufficient to furnish for such use, (for the purposes, whether domestic, industrial or otherwise, for which natural gas is consumed by the public or any part of the public), within the territory in this State served by such person, then and in that event the public service commission shall have authority, and the same is hereby conferred on it, upon the application of any such person or any of his consumers within this State and after due hearing upon notice and proof to the satisfaction of the commission that public convenience and necessity so require, to order any other person engaged in furnishing, or required by law (whether statutory or common law), to furnish natural gas for public use within this State, and producing or furnishing natural gas for public use in said territory, or transporting the same through said territory, to furnish to such person having such insufficient production or supply, natural gas for the purpose of supplying such deficiency, at and during such times, upon and at such just and reasonable terms, conditions and rates, and in such amounts, as the commission shall prescribe. And whenever, after such hearing upon notice and proof, the commission shall determine that public convenience and necessity so require, the commission shall have authority to provide for and compel the establishment of a reasonable physical connection or connections

between the lines, pipes or conduits of such person having such excess supply of gas and the lines, pipes or conduits of the person having such deficiency of supply, and to require the laying and construction of such reasonable extensions of lines, pipes or conduits as may be necessary for the establishment of such physical connection or connections, and to ascertain, determine and fix the just and reasonable terms and conditions of such connection or connections, including just and reasonable rules and regulations and provision for the payment of the costs and expense of making the same or for the appointment of such cost and expense as may appear just and reasonable. *Provided, however,* that no person shall, by virtue of this section, be ordered to furnish natural gas to any other person so engaged in furnishing, or required by law to furnish, natural gas for public use, except to the extent that the person so ordered to furnish natural gas shall, at the time, have a production or supply of natural gas in excess of the quantity sufficient to furnish a reasonably adequate supply to his consumers within this State; nor shall any person, by virtue of this section, be ordered to furnish natural gas to any other person so engaged in furnishing or required by law to furnish, natural gas for public use in a territory within this State, if and when the said person having said excess shall, to the extent of such excess, be ready and willing to furnish, and within such time as the commission shall prescribe, shall actually furnish, to the consumers within said territory a reasonably adequate supply of natural gas.

SECTION 3. That insofar as the same shall not be in conflict with this act, all of the authority, powers, jurisdiction and duties conferred and imposed on the public service commission by the act entitled, "An act to create a public service commission and to prescribe its powers and duties, and to prescribe penalties for the violations of the provisions of this act," passed February twenty-first, one thousand nine hundred and thirteen, as amended by the act entitled "An act to amend and re-enact sections one, two, three, four, five, nine, ten, fourteen, fifteen and twenty-two, of chapter nine of the acts of one thousand nine hundred and thirteen, creating a public service commission, prescribing its powers and duties, and penalties for violation of the provisions of said chapter, and to add thereto six sections to be known as sections twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight, enlarging the powers and duties of said public service commission, prescribing additional penalties and giving to the commission power to punish for contempt," passed February tenth, one thousand nine hundred and fifteen, are hereby conferred and imposed on the public service commission in respect to the subject matter of this act, or any part thereof.

SECTION 4. That in case of violation of any provision of this act any person aggrieved or affected thereby may complain thereof to the public service commission in like manner, and thereupon such procedure shall be had, as is provided in respect to other complaints to or before said com-

mission, and all such proceedings and remedies may be taken or had for the enforcement or review of the order or orders of said commission, and for the punishment of the violation of such order or orders, as are provided by law in respect to other orders of said commission. In case of the violation of any provision of this act, the public service commission, or any person aggrieved or affected by such violation, in his own name, may apply to any court of competent jurisdiction by a bill for injunction, petition for writ of mandamus or other appropriate action, suit or proceeding, to compel obedience to and compliance with this act, or to prevent the violation of this act, or any provision thereof, pending the proceedings before said commission, and thereafter until final determination of any action, suit or proceeding for the enforcement or review of the final order of said commission; and such court shall have jurisdiction to grant the appropriate order, judgment or decree in the premises.

SECTION 5. That if any person subject to the provisions of this act shall fail or refuse to comply with any requirement of the commission hereunder, such person shall be subject to a fine of not less than one hundred dollars nor more than five hundred dollars for each offense; and such person, or the officers of the corporation, where such person is a corporation, may be indicted for their failure to comply with any requirement of the commission under the provisions of this act, and upon conviction thereof, may be fined not to exceed five hundred dollars, and in the discretion of the court,

confined in jail not to exceed thirty days. Every day during which any person, or any officer, agent or employee of such person, shall fail to observe and comply with any order or direction of the commission, or to perform any duty enjoined by this act, shall constitute a separate and distinct violation of such order or direction of this act, as the case may be.

SECTION 6. That any person claiming to be damaged by any violation of this act may bring suit in his own behalf for the recovery of the damage from the person or persons so violating the same in any circuit court having jurisdiction. In any such action the court may compel the attendance of the person or persons against whom said action is brought, or any officer, director, agent or employee of such person or persons, as a witness, and also require the production of all books, papers and documents which may be useful as evidence, and in the trial thereof such witness may be compelled to testify, but any such witness shall not be prosecuted for any offense concerning which he is compelled hereunder to testify.

SECTION 7. That the word "person" within the meaning of this act shall be construed to mean, and to include, persons, firms, and corporations.

SECTION 8. That the sections, provisions, and clauses of this act shall be deemed separable each from the other, and also in respect to the persons, firms, corporations, and consumers mentioned therein or affected thereby, and if any separable part of this act be, or be held to be unconstitutional or for any reason invalid or unforceable,

the remaining parts thereof shall be and remain in full force and effect.

SECTION 9. That all acts and parts of acts in conflict with this act are hereby repealed."

This statute was preceded by the Public Service Commission Act, set forth as Exhibit "B," with the answers of West Virginia, which Act was designed to require reasonableness of rates, service and practices, and to prevent unjust preferences and discrimination, by public service corporations, including natural-gas companies, and to that end provided an administrative commission, to whose jurisdiction the due administration of the Act of 1919, here involved, was confided. (*Acts of 1913*, Ch. 9; *Acts of 1915*, Ch. 8.)

The States of Ohio and Pennsylvania, by their respective bills of complaint, complain that the enforcement of the Act of 1919 will necessarily prevent the transportation of West Virginia gas into Ohio and Pennsylvania, thereby destroying the investment of many of their citizens in natural-gas properties in West Virginia and also affecting the health and comfort, and endangering the lives, of numerous inhabitants of the plaintiff States who are presently consuming West Virginia gas; and thereupon the statute is attacked as unconstitutional and violative of those provisions of the Federal Constitution relating to interstate commerce, impairment of contract obligations, due process of law, equal protection of the laws, and abridgement of the privileges and immunities of citizens of the plaintiff States and of the United States.

Preliminary injunctions, awarded June 3, 1919, prior to answer by West Virginia, and in advance of any test of the statute's actual operation, have prevented its enforcement.

By its motion to dismiss and answer filed in each case, the State of West Virginia first challenges the right of the plaintiff States to maintain these suits, and then answers upon the merits, giving the history of the statute, the local causes and conditions leading to its enactment, and denies that the statute in anywise contravenes the Federal Constitution.

The questions before the Court are:

(1) Whether the bills present causes justiciable between the two States parties to the respective suits.

(2) Whether the suits were not prematurely brought, as no action has been taken by West Virginia or its Public Service Commission under the statute.

(3) Whether the statute, by its true construction, is violative of the Federal Constitution.

(a) As an interference with interstate commerce;

(b) As an impairment of contract obligations;

(c) As depriving the plaintiffs, or their citizens, of property without due process of the law;

(d) As denying to the plaintiff States, or their citizens, the equal protection of the laws;

(e) As abridging the privileges and immunities of citizens of the plaintiff States and of the United States.

EXHAUSTIBLE CHARACTER OF GAS.

In a record of the present bulk, even condensed narrative wears the color of prolixity. And where contemporary causes and conditions combine to produce an ultimate consequence, strict observance of chronological sequence and the avoidance of repetition in the separate chapters concurring to produce the whole are hardly practicable. With these qualifications we proceed to state, as shortly as the record and the importance of the cases seem to admit, the facts and circumstances in the legislative view, and the causes and conditions which created the necessity for, and justify the reasonableness of, the statute and brought about its passage.

Natural gas is produced by drilling wells into gas-containing strata or sands in the earth. The known fields in and from which gas is derived are, as a rule, comparatively few and restricted in area, the outstanding exception being those of West Virginia, which are in size and number so great as to constitute a more or less connected field extending across the State from north to south. As the number of gas wells in any field or other given area increases and the time during which the extraction of gas therefrom lengthens, the volume of the gas and the natural or rock pressure, upon which the output depends, gradually diminish, not only in the individual wells, but also in the entire field. The constant tendency, therefore, is in the direction of depletion of the field and exhaustion of the gas supply therefrom. And while for a considerable period the aggregate quantity of gas produced from a specific field may be increased or maintained at substantial uniform-

ity, this can only be accomplished by the drilling of new wells, the added extraction of gas from which still further accelerates the depletion of the field. For this reason it becomes necessary to sustain the output by exploration for new gas territory, and the development thereof when discovered. But even this extension of territory cannot be continued indefinitely, and the later discovered territories themselves are subjected to the same process of depletion and to the exhaustion of their gas. And so it occurs ultimately that the supply of gas, once adequate to the needs of the population dependent thereon, becomes insufficient for the service of all, and the uses of the gas, or the extent of its distribution and consumption, must be correspondingly curtailed. (Rec. 19-23, 60-63, 131-135, 201, 211, 282, 283, 296, 372, 431, 438, 521-525, 558, 689, 690, 697-700, 702, 719, 726-728, 801-804, 965.)

The foregoing was the experience in Indiana (Rec. 60, 61, 26, 728, 803), Ohio (Rec. 19-23, 61, 62, 685-687, 719, 727, 749, 801, 803, 804) and Pennsylvania (Rec. 19-23, 61, 62, 430, 431, 438, 486, 521-525, 558), where the extensive development and utilization of their own gas and its manifest tendency to depletion, preceded the transportation of West Virginia gas to the other states.

In Pennsylvania the depletion and shortage of gas was observed in certain fields as early as 1888, 1889 and 1890, and again in 1894 or 1895 (Rec. 19, 61, 62, 523, 524, 555, 558). In northern and northwesterly Ohio there were extensive shortages in 1900, 1902 and 1903 (Rec. 62, 719, 762-728, 748, 749, 764). The exhaustion of Indiana gas was manifest shortly after 1891 or

1892, and was extensive in 1900 (Rec. 60, 61, 726, 728, 803). This experience, and the inevitability of its duplication in West Virginia, were well known by the gas companies when they embarked in the business of West Virginia gas transportation to, or distribution in, the other states; and in the very nature of the case must have been known by the gas consumers of those states (Rec. 728).*

The Manufacturers Light & Heat Company entered West Virginia in 1902 or 1903 by the acquisition of local companies, whose business began in 1888 or 1889 (Rec. 63, 64, 94, 96, 97, 1039). The Philadelphia Company of Pennsylvania, through a subsidiary, went into West Virginia in 1897, after experiencing a shortage of Pennsylvania gas; and acquired in 1905 or 1906 the Fairmont & Grafton Gas Company, whose name was changed to the Pittsburg & West Virginia Gas Company, which delivers the bulk of its gas to the Equitable Gas Company and other Pennsylvania distributing subsidiaries of the Philadelphia Company (Rec. 523, 524, 484, 487, 511, 512, 516, 517, 1030, 1031). The Hope Natural Gas Company was organized in 1898 and took over the gas properties and franchises of certain companies (Rec. 322, 340-342 *et seq.*, 1173, 1329); and the Reserve Gas Company in 1902 (Rec. 322 323, 748). The United Fuel Gas Company was organized in 1903 and expanded in 1909 by the absorption of the United States Natural Gas Company, which previously acquired the properties of local West Vir-

*The gas sales contracts of the exporting companies, hereinafter mentioned, by their provisions for priority service, indicate, as well as the physical facts, that the decline of West Virginia gas was anticipated.

ginia Gas companies (Rec. 359, 386, 1031, 1032). The Columbia Gas & Electric Company was organized and acquired its West Virginia properties in 1906 (Rec. 455, 456).

Of the companies buying gas from the Hope Natural Gas Company, a Standard Oil Company subsidiary, the Peoples Natural Gas Company, also a Standard subsidiary, supplying gas in Pittsburgh territory, experienced a shortage in or before 1903, when its purchases from the Hope commenced (Rec. 424); and the East Ohio Gas Company, also a Standard subsidiary, distributing gas at Cleveland, Akron, Canton and other Ohio points, was organized in 1898 (Rec, 323, 569, 578, 598, 1033), and commenced its Cleveland business in 1903, after the exhaustion of the north and northwest Ohio fields had begun (Rec. 593, 719, 726-728). The Fayette County Gas Company, operating at Uniontown and other Pennsylvania towns, was organized in 1900 and commenced its purchases in 1910 (Rec. 534, 555, 557, 558).

The Ohio Fuel Supply Company, which with the Columbia Gas & Electric Company owns the United Fuel Gas Company, and supplies gas to Cincinnati, Columbus, Springfield, Zanesville and other places in Ohio, was incorporated in 1902, and received no West Virginia gas until 1909, when its purchases from the United Fuel commenced (Rec. 650, 683-686). The Northwestern Ohio Natural Gas Company, supplying Toledo and other Ohio municipalities, organized in 1887, and a subsidiary of the Ohio Fuel Supply Company, began to buy from the Hope Natural Gas Company in 1903 or 1904, after the exhaustion of its north-

western Ohio field had become manifest, and after the Indiana gas had been exhausted (Rec. 658, 671, 718, 719, 726, 727). The Union Natural Gas Corporation, which with the Standard Oil Company owns the Reserve Gas Company, also owns the Logan Natural Gas & Fuel Company and other companies, supplying Dayton, Muncie and other Ohio and Indiana cities. Before the time of its organization, and when the Logan Company was acquired, there had been a sharp decline of their Ohio gas fields; and since about 1904 the Logan Company has received West Virginia gas from the Reserve Gas Company under the latter's contract with the Union Natural Gas Corporation (Rec. 747-755, 758-764, 773).

West Virginia Gas Development and Utilization.

West Virginia is, and for more than twenty years last has been one of the principal gas-producing States. The volume of its production is, and for twelve years last past has been, the largest in the United States (Rec. 1120). At present gas is produced in large quantities in and from the counties of Boone, Braxton, Brooke, Cabell, Calhoun, Clay, Doddridge, Gilmer, Hancock, Harrison, Kanawha, Lewis, Lincoln, Logan, Marion, Marshall, Mingo, Monongalia, Nicholas, Ohio, Pocohontas, Pleasants, Putnam, Ritchie, Roane, Taylor, Tyler, Upshur, Wayne, Wetzel, Wirt and Wood, being thirty-two of the fifty-five counties; while gas has been found in paying quantities, and large areas are leased and held as prospective gas territory, in six other counties (Rec., 980). The earliest West Virginia development was in the northern section. Originally

considered a nuisance in the oil operations, with which it was first produced, the gas was blown into the air and wasted; but later its value for domestic heating and lighting , as well as for factory fuel and general industrial use, was recognized. Wells were then drilled for gas. The enormous production and very great rock pressure (sometimes called natural pressure) in the early wells enabled the gas to be transported through pipe lines for considerable distances without the assistance of compressors; and aside from the cost of leases and drilling, the mere laying of a pipe line to the point of distribution was practically all of the investment required for local use.

In many instances small companies or individual operators obtained franchises and furnished gas to a municipality or community near at hand. Other and larger concerns connected their gas wells and lines into systems serving under franchises a number of separate municipalities and localities. Beginning in the period between 1889 and 1894, the most important cities and towns in the northern and north-central sections of West Virginia were thus served with gas by local companies, viz., Wheeling, Moundsville, Morgantown, Fairmont, Clarksburg, Grafton, Weston, West Union, Parkersburg, Sistersville, St. Marys, and many other municipalities in the Panhandle section and throughout the counties of Marshall, Wetzel, Monongalia, Marion, Harrison, Lewis, Doddridge, Ritchie, Tyler, Pleasants and Wood (Rec., 1117 *et seq.* 1173, 1174, 1205, 1206, 1218, 1219, 1267, 1343).

Its abundance, cleanliness, convenience and economy over other forms of fuel were so great that the use

of gas spread rapidly, and it soon became the universal and exclusive fuel in the northern and north-central sections of West Virginia for dwelling houses, business buildings, churches, schools, colleges, hospitals, asylums, court-houses, electric light and power plants, water works, municipal street lighting and many other purposes. In the then existing dwellings and buildings, the means and appliances for consumption of other fuel were generally discarded. New houses and buildings were in general constructed and equipped with a view to the exclusive use of gas for heating, and, in many instances, for illumination (Rec. 1119-1122, 1220-1223, 1343). The existing industries adopted gas for fuel, and a great number of new factories and other industries to which cheap fuel was important were established. The local gas companies in many instances, in order to upbuild the municipalities served by them, and thereby to stimulate the consumption of their gas, pursued for many years the policy of encouraging the establishment of new industries by the offer of gas at low prices during long periods of time. The industries thus established were located and constructed for, and their processes and products especially adapted to, the use of gas as fuel. They employed many workmen and laborers, both skilled and unskilled, who were dependent for employment and the livelihood of themselves and their families on the existence and continued operation of the gas-using industries. The population and wealth of the cities, towns and communities so supplied with gas, and of the State as a whole, thus increased; and the added population at once profited the gas companies by adding to the

consumption of their gas, and promoted the general prosperity.

This history was duplicated in the south-central and southern sections as the discovery and development of gas extended southward. In Charleston, Huntington, Spencer, Glenville, Point Pleasant, St. Albans, Kenova, and many other places in the gas-producing counties gas likewise became the universal and exclusive fuel, and the use thereof brought to pass the like development and growth of population, wealth and general prosperity (Rec., 1117 *et seq.*).

From this it followed that the domestic life and the business of a majority of the people of West Virginia were and are modified and their adjustments made with reference to the continued use of gas as fuel; and gas in reasonably adequate quantities for domestic and industrial use became, was and is a necessity throughout the greater part of the State.

According to the United States Geological Survey statistics for 1918 (Rec., 1566, insert p. 145, Pa. Exhibit No. 45), the West Virginia gas consumers in that year were divided into 127,168 domestic and 1,873 industrial users. The domestic users in 1919 were 130,780 (Rec., 849). Estimating, as is usually done, an average of four and one-half or five persons in the family of each domestic consumer (Rec., 908), would show from 585,000 to 650,000 West Virginians dependent on domestic service alone.

GAS SHORTAGE IN WEST VIRGINIA.

Until the winter of 1916-1917, all consumers in the State were adequately served. The extent of the West Virginia fields and the quantity of production until that time were greater than ever before known in the gas industry. The supply in the hands of the public utilities, produced within the State, was at all times from four to five times greater than the total amount used by the domestic and industrial consumers of the State (Rec., 996). Under these circumstances West Virginia and its gas consumers rested in security.

In the winter of 1916-1917, however, the people of West Virginia were rudely disillusioned. Early in that winter began an inadequate service of gas, which, by midwinter, developed into an extensive shortage (Gov. Cornwell, Rec. 1194, 1196; 1139-1154, 1223-4, 1282, 1343-1345. And this recurred in the following winters, (Rec. 840-846). In an effort to meet the situation, and under a rule of the West Virginia Public Service Commission, all industrial gas was shut off; but yet the suppy was inadequate to warm the homes of domestic consumers. For a long period of extremely cold weather the shortage deprived dwelling-houses, hotels, stores, and public and private buildings of sufficient heat, and in some instances, of any heat. In the homes and hotels, cooking was prevented, and in many cases illness was caused or accentuated by the cold. Public schools were closed and churches compelled to forego their customary exercises. Factories were shut down with great loss to their owners, and their workmen thrown out of employment. An extreme example was the State Tuberculosis Sanitarium, at Terra Alta, where the supply failed utterly, and in order to keep the patients from

freezing, the officials were compelled in zero weather to build fires and erect stoves with funnels or stove-pipe projecting from the windows (Rec., 1153). The State Penitentiary at Moundsville in Marshall county, the West Virginia University at Morgantown in Monongalia County, the State Hospitals for Insane at Weston in Lewis County and at Spencer in Roane County, the Industrial School for Girls at Salem in Harrison County, the Industrial School for Boys at Pruntytown in Taylor county, the Fairmont Hospital and the Fairmont Normal School at Fairmont in Marion County, the Glenville Normal School at Glenville in Gilmer County, all State institutions, situate within developed gas territory, were likewise affected and driven to the use of other fuel. Distress or inconvenience to domestic consumers, and the shutting down of industries, occurred practically in all sections of the State where gas was used, from the northern Panhandle southward to Charleston (Rec., 1195). The severity was as great in the sections lying in the most prolific fields as elsewhere and many of the places affected were in proximity to the territory and gas lines of the companies most extensively engaged in the transportation of gas to or for consumption in other States (Rec. 1177 *et seq.*; 842-845; and see maps).

Cause of Shortage.

The cause of this gas shortage is not far to seek. The various statements in the record, too numerous and intricate to set out in detail, and not capable of precise reconciliation in some instances, concur in showing that the shortage in West Virginia, was and is due to the enormous volumes of West Virginia gas

exported by certain public service corporations of West Virginia, to or for consumption in the other States, and the consequent drainage of the West Virginia gas fields, without regard to present or future needs of West Virginia, or the duties of the exporters to the latter State.

The earliest figures available are for the year 1908. The following, (Rec., 1603, 1378, 992), shows the total amounts exported from West Virginia to and including the year 1919 as compared with the total production of the State:*

Year	Total Production M. Cu. Ft.	Exports M. Cu. Ft.	Per Cent.
1908	112,181,278	61,644,618	55
1909	166,435,092	96,074,387	58
1910	190,705,869	120,508,811	63
1911	206,890,576	132,867,059	64
1912	239,006,682	151,144,250	63
1913	245,453,985	155,501,876	63
1914	236,489,175	150,161,936	63
1915	244,004,159	154,630,164	63
1916	299,318,907	200,004,740	67
1917	289,898,967	196,679,263	68
1918	280,289,044	174,664,650	62
1919	219,886,837	139,939,062	64

But the foregoing statistics of total production and export, and the calculation of consumption in West Virginia by subtraction of the total export from the total production, while pointed to by the plaintiffs,

*The total production above, except for 1918 and 1919, is as stated by the United States Geological Survey Reports. For 1918 and 1919, the production is computed by the Statistician of the West Virginia Public Service Commission from reports to the Board of Public Works and the Public Service Commission (Rec. 990-992).

are irrelevant. As explained in the margin,* a large proportion of the gas included in the total West Virginia consumption consists of free gas to lessors and gas used by the gas companies in field operations, which are properly operating expenses, and gas produced and consumed by persons and corporations, whose property has not been devoted to public use or affected with a public interest, and which therefore is neither available to the public in fact nor by statutory compulsion.

**Statistics on Production and Consumption.*—In the subsequent statistics, West Virginia has used as a basis the net supply available for service to the public. Before gas is available for public use, the producer must deliver to the landowner the free gas uniformly reserved in gas leases as part of the rental, the ordinary individual consumption whereof has largely exceeded that of the average domestic consumer, and the aggregate amount of which has been very considerable (Rec. 241, 414, 415, 848, 1062).

Large quantities of gas are consumed for field purposes, namely, for fuel used in drilling and cleaning out wells, the operation of compressor or pump stations to transport the gas, and the various other purposes necessary to the production and transportation of gas to market. The quantities so used amount to approximately 7 per cent of the annual production (Rec., 949, 989, 990, 992). Calculation based on the total sales and field gas consumption of the Hope Natural Gas Company in 1919, Rec., 267, gives a similar result.

Again, in West Virginia, as in other States, certain producers (consisting for the most part in West Virginia of carbon-black manufacturers, but also including a few other industries) hold and produce gas from their own territory and for their own consumption and are not public-service corporations (Rec., 989, 990, 992.

None of the free gas delivered in payment for leases, nor that used for field purposes or consumed by such private enterprises, reaches the public. To include the free or field gas as a part of the West Virginia consumption would at once charge West Virginia consumers with what they do not in fact receive, and at the same time free consumers in other States from the proportion chargeable to the production and transportation of the much greater quantities of exported gas. The total of these three items in the past ten years has averaged approximately 15 per cent. of the annual production. (See statistics, Rec., 992.) This gas should be eliminated from the public service gas supply, thus confining the statistics and discussion to the remaining 85 per cent. as the net supply of the public-service corporations available for service (*Pittsburgh & W. Va. Gas Co. vs. Nicholson*, 87 W. Va., 540, 544-546). Statisticians for the plaintiffs, however, include these three items in the supply of West Virginia consumers, and thereby have produced percentages to show that they use more gas *per capita* than the consumers in other States (Rec., 899-901; 948-950).

The distinction between the total production and the net supply available for public service is important in comparison of the amount and proportion used by West Virginia consumers with the exported gas. For example, in 1916 the total production of the State by all operators and for all purposes was 299,318,907 M cubic feet, and there was in the hands of the public-service corporations of the State a net supply of 259,414,200 M cubic feet available for service to the public and disposed of by said corporations (Rec., 992), yet of this latter volume the total served to all West Virginia consumers was only 59,409,460 M cubic feet, or 22.9 per cent. The figures for nine years show that the maximum used by West Virginia consumers never exceeded 25.6 per cent of the net supply, so available for public service (Rec., 996):

Year	Net Supply for Public Service	Sales to W. Va. Consumers	Per Cent. to W. Va. Consumers	Per Cent Exported
	M. Cu. Ft.			
1911	173,132,353	40,265,294	23.3	76.7
1912	203,112,738	51,968,488	25.6	74.4
1913	209,131,295	53,629,419	25.6	74.4
1914	200,762,645	50,600,709	25.2	74.8
1915	207,777,882	53,147,718	25.6	74.4
1916	259,414,200	59,409,460	22.9	77.1
1917	245,620,686	48,942,388	19.9	80.1
1918	227,649,823	52,985,173	23.3	76.7
1919	183,687,047	46,654,098	25.4	74.6

Of the gas available for public service, a proportion ranging from 80.3 per cent. to 91 per cent., has, by

the means hereafter explained, been controlled by seven companies, the Hope Natural Gas Company, Reserve Gas Company, Pittsburgh & West Virginia Gas Company, Carnegie Natural Gas Company, Manufacturers Light & Heat Company, United Fuel Supply Company and Columbia Gas & Electric Company, the companies chiefly engaged in the transportation of West Virginia gas to or for consumption in other States. The quantities and percentages controlled by these seven companies are illustrated by the following tabulation (Rec. 996, 1736, insert p. 414):

Year	Net Supply for Public Service	Net Supply of Seven Companies	Per Cent.
	M. Cu. Ft.		
1911	173,132,353	147,431,246	85.1
1912	203,112,738	172,050,962	84.7
1913	209,131,295	167,897,746	80.3
1914	200,762,645	166,625,730	83.0
1915	207,777,882	170,694,495	82.1
1916	259,414,200	220,892,583*	85.1
1917	245,620,686	223,517,777	91.0
1918	227,649,823	201,685,702	88.6
1919	183,687,047	164,426,341	89.5

And out of the abundance of the supply of the seven companies, the proportion granted to West Virginia consumers extended from 11 per cent to 17.9 per cent, as shown by the following (Rec., 997):

*The figure on Record, page 996, is a typographical error. See Rec., 1736, insert p. 383.

Year	Net Supply of Seven Companies	Sales to West Virginia Consumers	Per Cent.
	M. Cu. Ft.		
1911	147,431,246	17,200,747	11.7
1912	172,050,962	21,101,443	12.3
1913	167,897,746	22,297,677	13.3
1914	166,625,730	20,612,599	12.4
1915	170,694,495	18,860,867	11.0
1916	220,892,583	24,526,859	11.1
1917	223,517,777	26,889,876	12.0
1918	201,685,702	30,120,273	14.9
1919	164,426,341	29,360,811	17.9

The entire balance of their net supply for these years was marketed by the seven companies for consumption in other States. The following statement (deduced from the tabulation at Rec., 997) shows that of the West Virginia gas of the seven companies from 82.1 per cent. to 89 per cent. went to other States in the nine years from 1911 to 1919:

Year	Net Supply of Seven Companies	Amount Exported	Per Cent.
	M. Cu. Ft.		
1911	147,431,246	130.230,499	88.3
1912	172,050,962	150.949.519	87.7
1913	167,897,746	145,600,069	86.7
1914	166,625,730	146,013,131	87.6
1915	170,694,495	151,833,628	89.0
1916	220,892,583	196,365,724	88.9
1917	223,517,777	196,627,901	88.0

1918	201,685,702	171,565,429	85.1
1919	164,426,341	134,065,530	82.1

WEST VIRGINIA PUBLIC SERVICE GAS COMPANIES.

As of December 31, 1919, there were in West Virginia about sixty-seven natural gas public service corporations (Rec. 982, 1365),* all of which, by its language, fall within the purview of the statute in contest. By public service corporations we mean those concerns, whether corporate or individual, commonly denominated as public utilities. (Cf. *Van Dyke vs. Geary*, 244 U. S., 39, 43-45, per Mr. Justice Brandeis; *Southern Iowa El. Co. vs. Charlton*, 255 U. S., 539, 542, 543; *Winchester vs. Winchester Water Works Co.*, 251 U. S., 192, 197, per Mr. Justice Day.) They fall within the category of "corporations which devote their property to a public use" (*New York vs. McCall*, 245 U. S., 345, 351), or whose business is "affected by a public use." (*Stafford vs. Wallace*, U. S. Adv. Ops., 1921-2, p. 469; *Clarksburg L. & H. Co. vs. Public Service Com.*, 84 W. Va., 638, 644-646, 100 S. E., 551; *Mill Creek Coal & C. Co. vs. Public Service Co.*, 84 W. Va., 662, 668, 669, 100 S. E., 557; *German Alliance Ins. Co. vs. Lewis*, 232 U. S., 389.)

*The lists in the Record, pp. 982 and 1365, were compiled from the records of the Board of Public Works and the Public Service Commission. The sixty-seven companies, while reporting to those authorities, include a number only incidentally serving gas, such as oil companies and certain carbon-making and manufacturing plants, which utilize their production in their own private enterprises and whose consumers are limited to their employees or to lessors entitled to free gas. Of this character are the South Penn Oil Company (Rec., 1447), Ohio Fuel Oil Company (Rec., 1004), Columbian Carbon Company, Imperial Oil & Gas Products Company, and Owens Bottle Machine Company, none of which in fact supplies gas to the public, nor do they profess or hold themselves out to be public-service corporations (Rec., 998, 1004, *et seq.*).

Embraced within the sixty-seven companies are not only the Hope Natural Gas Company, the Reserve Gas Company, the Pittsburgh & West Virginia Gas Company, Carnegie Natural Gas Company, Manufacturers Light & Heat Company, United Fuel Gas Company and Columbia Gas & Electric Company, but also the numerous smaller corporations engaged in the public supply of gas (Rec. 1034-1042). Examples are, the Clarksburg Light & Heat Company at Clarksburg (Rec. 842, 1035, 1203); the Charleston-Dunbar Natural Gas Company at Charleston, St. Albans and South Charleston (Rec. 1036); the Huntington Gas & Development Company at Huntington and the vicinity thereof (Rec. 1180); the West Virginia Traction & Electric Company and the Randall Gas Company at Morgantown (Rec. 1034), 1041, 1142); The Monongahela Valley Traction Company at Fairmont (Rec. 1034, 1035, 1220); the Glenville Natural Gas Company at Glenville (Rec. 1034); the Keener's Oil, Natural Gas & Fuel Company at Weston (Rec. 1035, 1147, 1256); the West Virginia Heat & Light Company in Ritchie County towns (Rec. 1035); the Buckhannon Fuel Supply Company at Buckhannon (Rec. 1039); the Comet Oil & Gas in Taylor County, (Rec. 1035), and the Montgomery Gas Company in Kanawha and Fayette Counties, (Rec. 1041).*

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*It may be noted in passing that in some instances smaller companies engaged in the public service sell part of their gas to some of the seven companies principally carrying on the export business. Examples are afforded by sales of the Comet Oil & Gas Company to the Hope Natural Gas Company, (Rec., 1736, insert p. 282); Clarksburg Light & Heat Company to the Pittsburgh & West Virginia Gas Company, (Rec., 1036, 1736, insert p. 299); the Charleston-Dunbar Natural Gas Company to the United Fuel Gas Company, (Rec., 1036, 1736, insert p. 316).

To these companies, engaged in the public service of gas, the State extended broad charter powers, but subject to the reserved legislative right to alter any charter and to alter or repeal any law applicable to a company (*Code of W. Va.*, Ch. 53, sec. 8; *Acts of 1867*, Ch. 5, sec. 6; *Acts of 1882*, Ch. 96, sec. 8; *Manufacturers Light & H. Co. vs. Ott*, 215 Fed., 940; *St. Mary's &c. Petroleum Co. vs. West Virginia*, 203 U. S. 183). It gave the power of eminent domain, without which the construction of the great pipe-line systems hereinafter mentioned would not have been possible. This power was often exercised, and where not exercised was obviously potential in negotiations for the purchase of rights of way for pipe lines and other facilities (Rec. 1215, 1216, 1802-1917, 246, 382, 520; *Carnegie Nat. Gas Co. vs. Swiger*, 72 W. Va., 557, 79 S. E., 3; *Charleston Nat. Gas Co. vs. Lowe*, 52 W. Va., 662, 44 S. E., 410) County courts granted to them franchises for the free use of the public highways, upon and along which they constructed and maintain pipe lines, boxes, connections, and telegraph and telephone lines (Rec. 74, 246, 247, 519, 1016, 1017, 1917; *Hardman vs. Cabot*, 60 W. Va., 664, 55 S. E., 756). Under like franchises from cities and towns they were given and enjoy the use of streets and alleys (Rec. 70, 247, 248, 382, 386, 519, 1174). The various pipe lines for gathering, transmission and service of gas spread in a network over the gas fields and gas producing counties.

While its liberal policy toward those engaged in the public service of gas was primarily dictated by the motive to provide for its own people, West Virginia was not illiberal toward consumers in other States.

No program of conservation was adopted or attempted, nor were efforts made to restrict the enormous and continually increasing volume of gas which, in later years, certain of its public service corporations transported, or sold for transportation, to consumers in other States. The right of these public service corporations so to dispose of their surplus in other States was recognized by permitting them to exercise the power of eminent domain for the construction of pipe lines transporting chiefly for foreign consumption, subject only to the duty of first serving West Virginia consumers in the territory through which such lines extended. (See *Carnegie Nat. Gas Co. vs. Swiger,* 72 W. Va., 557, 572, 573, 79 S. E., 3).

The Seven Companies.

We emphasize that the statute in question applies equally to all public-service gas companies. But it is nevertheless true that the marvelous disparity of the gas supply to West Virginia and the manifest discrimination against it in the distribution of its own product, were brought about by the seven public-service gas corporations (in practical interest and effect, five only), whose rights are so strongly sought to be vindicated by the plaintiffs. This was effected by the domination by the seven companies of the major part of the gas territory and gas supply of the State, vesting in them a virtual monopoly, and by the enormous sales of West Virginia gas for consumption in other States, already evidenced by the statistics above presented. While, therefore, the seven companies have not been singled out for hostile legislation, their relation to the present lit-

igation and to the West Virginia gas shortage requires special mention of their circumstances.

The seven companies, either in their original form or in the aspect later assumed, were and are, the Hope Natural Gas Company, Reserve Gas Company, Pittsburg & West Virginia Gas Company, Carnegie Natural Gas Company, Manufacturers Light & Heat Company, United Fuel Gas Company, and Columbia Gas & Electric Company. While seven in number and referred to throughout these causes as "the seven companies," they are, in effect, only five in interest and operation, because of the identity of control of the Hope Natural Gas Company and the Reserve Gas Company and of the United Fuel Gas Company and the Columbia Gas & Electric Company.

The Hope Natural Gas Company is owned, and the Reserve Gas Company is controlled, by Standard Oil Company of New Jersey (Rec., 322); the minority stockholding of the Reserve is presently owned by Union Natural Gas Corporation, a holding corporation controlling a number of companies engaged in producing and marketing natural gas to various cities in Ohio (Rec., 323); Carnegie Natural Gas Company is a subsidiary of the United States Steel Corporation (Rec., 925, 926, 937); Pittsburg & West Virginia Gas Company, formerly the Fairmont & Grafton Gas Company, an independent local company (Rec. 487, 511, 512, 1030), is a subsidiary of the Philadelphia Company of Pennsylvania (Rec., 509-513), a holding company with a number of other subsidiaries engaged in producing and distributing natural gas and owning and operating the street-railway system of Pittsburgh and various

other large enterprises; the Manufacturers Light & Heat Company is a merger of some twenty to twenty-five companies formerly in the natural gas business in Pittsburgh and many municipalities of Western Pennsylvania, and also along the Ohio River in West Virginia and Ohio (Rec., 1029, 65, 71, 73, 78); and the United Fuel Gas Company is presently owned by the Columbia Gas & Electric Company and Ohio Fuel Supply Company (Rec., 378-379), the former owning or controlling the lighting and heating systems in Cincinnati, Covington and other cities in Ohio and Kentucky, in addition to producing and distributing gas elsewhere, and the Ohio Fuel Supply Company being a producing and marketing company in Ohio, selling gas to consumers and local gas companies in Ohio.

Status of the Seven Companies.

All of these seven companies, in common with the other public service gas companies, were chartered or authorized to carry on business in West Virginia in the light of the following pre-existing statute (*Code*, ch. 53, Sec. 8; Acts of 1867, ch. 5, Sec. 6; Acts of 1882, ch. 96, Sec. 8):

> "And the right is hereby reserved to the legislature to alter any charter or certificate of incorporation hereafter granted to a joint stock company and to alter or repeal any law applicable to such company."

As to the nature of the seven companies, when the Act of 1919, now in contest, was passed, we summarize the following:

(1) All seven companies were and are public-

service gas corporations of West Virginia in the sense hereinbefore defined. Five of them, the Hope Natural Gas Company, Reserve Gas Company, Pittsburg & West Virginia Gas Company, United Fuel Gas Company, and Columbia Gas & Electric Company, were chartered under the laws of West Virginia. The Manufacturers Light & Heat Company and Carnegie Natural Gas Company were chartered under the laws of Pennsylvania, but, as a condition precedent to doing business in West Virginia necessarily received from the State authorization to do business under the laws applicable to domestic corporations, and became and were to all intents and purposes, domestic corporations, insofar as concerned their property, business, rights and duties in the State (Rec., 1885; Code W. Va., ch. 54, Sec. 30). In addition, substantially all the gas territory, leases, pipe-line systems, rights of way, franchises and other property of the Manufacturers Light & Heat Company in West Virginia were acquired by absorption of the Wheeling Natural Gas Company and other public-service corporations theretofore chartered and serving the public under the laws of West Virginia (Rec., 63, 69, 1029).

The substance and effect of the charters of these seven companies, set forth with varying degrees of elaboration in their respective condemnation proceedings, sufficiently evidence their character. Thus the Reserve Gas Company and the Hope Natural Gas Company both allege (W. Va. Exs. Nos. 45 and 46, Rec., 1803, 1822) that their charter powers include:

> "The producing, dealing in, buying and selling, acquiring, storing, transporting by pipes and

otherwise natural gas for its own use and for the selling and supplying of natural gas for industrial, commercial, domestic and other public and private uses for heat, light, fuel and power to persons, firms, partnerships, corporations and other consumers and other municipalities and places in the State of West Virginia as well as elsewhere, where the said natural gas may be discovered, purchased, stored or transported by the said * * * Gas Company." * * *

and

"Also to have, exercise and enjoy the right of eminent domain, and in the exercise of such right to take, condemn, use and enjoy such lands, rights of way, easements and property as shall be necessary to enable it to lay and construct its mains, pipes and conduits, pump stations, telegraph and telephone lines, dams and other structures and appliances necessary and required or convenient to the producing, storing, cooling and transporting of natural gas."

And, though not obeyed or enforced (Rec., 312, 315, 352, 520, 1257, 1425, 1426), the public character of natural-gas pipe lines has been declared in West Virginia since the year 1891, under the provisions of its Code, Chapter 52, Section 24, extending the power of eminent domain to companies organized for the purpose of transporting such gas, and declaring that,—

"Such company shall for the purpose of transporting natural gas, oils and water be considered and held to be a common carrier, and subject to all the duties and liabilities of such carrier under the laws of this State."

(2) The seven companies, and the constituent companies absorbed by them, pursuant to their charter powers, engaged in the service of natural gas to the people of West Virginia, and have at all times since served a large number of its people. Prior to the Act of 1919, here involved, and now, these companies, like other gas companies, were and are subject to the Public Service Commission Act (*Acts* of 1913, Ch. 9; *Acts* of 1915, Ch. 8; *United Fuel Gas Co. vs. Public Service Com.*, 73 W. Va., 571, 80 S. E. 931; *Randall Gas Co. vs. Star Glass Co.*, 78 W. Va., 252, 88 S. E. 840; *Clarksburg L. & H. Co. vs. Public Service Com.*, 84 W. Va., 638, 100 S. E. 551; *Kelly Axe Mfg. Co. vs. United Fuel Gas Co.*, 87 W. Va., 368, 105 S. E. 102; *Manufacturers L. & H. Co. vs. Ott*, 215 Fed., 940). They have acknowledged their character as public service corporations, and as such have filed their tariffs and schedules before the West Virginia Public Service Commission and accepted the rates and regulations prescribed by that body (Rec., 1365, 1922-1943).

From an application of the Hope Natural Gas Company, the largest of the seven companies, for leave to increase rates (W. Va. Ex. No. 53, Rec., 1923), we quote as an example the following typical averment:

> "That its principal place of business is in the following towns where it distributes natural gas and in the neighboring country districts and villages, viz: Belmont, Clarington, Colliers, Eureka, Fairview, Friendly, Glovers Gap, Littleton, Lima, Lost Creek, Mt. Clare, Mannington, Metz, Minora, Parkersburg, Paden City, Pine Grove, St. Marys, Sistersville, Smithfield, Williamstown and Wiley-

ville, West Virginia, and that it is a public-service corporation engaged in the management and operation of a natural-gas plant in said cities and towns and that as such public-service corporation in the service of natural gas to the domestic consumer it is subject to the provisions of Chapter 9, Acts of the Legislature of West Virginia for 1913 and 1915 and of the Code of West Virginia applicable to this class of corporations."

These seven companies, or some of them operate in thirty-seven counties of West Virginia, having a population of 1,065,980 in 1920, and supply gas in 49 municipalities with a population of 199,469 (Rec. 1012, 1037). Their pipe lines aggregate 7,618 miles (Rec., 1016). The extent of their gas territory and the volume of their gas are referred to elsewhere herein.

(3) The service to West Virginia consumers so authorized and undertaken by the seven companies embraces gas for domestic, industrial, commercial and other purposes. The public professions of the Hope Natural Gas Company and Reserve Gas Company as to such service are exemplified by the following quotation from the printed form used in their applications to the courts of the State for leave to condemn for pipe lines (Rec., 1823, 1804):

> "That since the granting of said new or amended and modified charter or certificate of incorporation, as well as for several years before, petitioner has been and is engaged in the business of selling and supplying natural gas for industrial, commercial, domestic and other public and private uses for heat, light, fuel and power

to persons, firms, partnerships, corporations and other consumers and purchasers for use in incorporated cities, towns, villages, districts and other municipalities and places in the State of West Virginia, and has been and is supplying natural gas to the public for fuel, illuminating and other purposes, and has been, and is still, at great expense and cost to it, erecting, laying, maintaining and operating pipes and lines of pipe, etc., for transporting natural gas with which to supply the public and said other purchasers and consumers with natural gas for fuel, illuminating, heat, power and other purposes; and that it has been and is transporting natural gas to be supplied to the public and said other purchasers and consumers for fuel, heat, illuminating, power and other purposes by and through its said pipes and pipe lines."

The attitude of the Pittsburgh & West Virginia Gas Company was expressed in the following language (Rec., 1843):

"1st. That petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of West Virginia, for the purposes of transporting carbon oil and natural gas, or both, by means of pipe lines, or otherwise, for public use; that petitioner is now engaged in the business of producing, transporting and selling natural gas for public use and is now producing large quantities of natural gas within the State of West Virginia, and is transporting the same to market by means of certain pipe lines constructed and maintained by it; that the natural gas so transported

by said lines is being sold to the public in the following incorporated cities, towns and villages, to wit: Grafton, Enterprise, Shinnston, Lumberport, Haywood, Colfax, Worthington, Simpson, Pruntytown, Blueville, Thornton and Flemington, all within the State of West Virginia, and other places in the State of West Virginia not incorporated, and many persons not living in any city, town or village, are likewise being supplied with natural gas for domestic and industrial uses by this petitioner by means of its said system of pipe lines; that the transportation of said natural gas and the sale thereof is for the use of the public generally for the purpose of supplying light and heat to such public; and that your petitioner is ready and willing at all times, and has so held itself out, to sell said gas to the public, or any portion thereof, upon the payment of a reasonable price therefor."

Substantially the same assertions and professions were made by the constituent and predecessor companies, Fairmont & Grafton Gas Company (Rec. 1896) and The Philadelphia Company of West Virginia (Rec., 1857), while the Carnegie Natural Gas Company uses language even broader (Rec., 1876), containing the additional averment that it is a common carrier of natural gas under the laws of West Virginia.

(4) With respect to future consumption and extensions of service for domestic, industrial and other uses of gas, the seven companies expressed their sense of obligation to West Virginia consumers as follows:

The Pittsburgh & West Virginia Gas Company and

its predecessor, Fairmont & Grafton Gas Company, stated of record (Rec., 1843, 1896) that each was:

> "* * * ready and willing at all times, and has so held itself out, to sell said gas to the public or any portion thereof, upon the payment of a reasonable price therefor."

The Philadelphia Company of West Virginia, the other constituent company of Pittsburgh & West Virginia Gas Company, alleged (Rec., 1857):

> "Your petitioner is constantly increasing the number of its consumers and is desirous of largely increasing its sales of gas in the various counties of West Virginia traversed by its lines. Your petitioner is ready and willing to sell gas to all parties within reaching distance of its pipe lines who apply for the same, at reasonable rates. Your petitioner, being a public-service corporation, as hereinbefore stated, is ready and willing to furnish gas at all times to the public, as aforesaid."

The Carnegie Natural Gas Company alleged (Rec., 1876):

> "Your petitioner is constantly increasing the number of its consumers and it is desirous of largely increasing its sales of gas in the various counties of West Virginia traversed by its lines. Your petitioner is ready and willing to sell gas to all parties within reaching distance of its pipe lines who apply for the same at reasonable fixed rates which are in general effect throughout the State of West Virginia, and which rate is as follows: 25 cents per thousand cubic feet of gas; also

flat rate of $1.50 per month for one fire. Your petitioner, being a public-service corporation, as hereinbefore stated, is ready and willing to furnish gas at all times to the public, as aforesaid."

The Wheeling Natural Gas Company, the principal constituent through which the Manufacturers Light & Heat Company was doing business in West Virginia in the year 1906, alleged (Rec., 1905):

"That petitioner in the exercise of its rights, powers, and privileges and in the conducting of its business has been and is supplying the incorporated cities, towns, and villages of Benwood, Chester, McMechen, Moundsville, Newell, and other towns and vicinities and manufactories within the State of West Virginia, and the inhabitants of said cities, towns, and villages, with natural gas, for heating, fuel, illumination, power and other purposes, under ordinances of said several cities, towns, and villages, as well as a large number of unincorporated towns and villages in the said State of West Virginia, and persons residing in and inhabiting such unincorporated towns and villages, and any and all persons residing along the lines of your petitioner, desiring natural gas."

The Hope Natural Gas Company, after an extensive enumeration of the various cities, towns, and communities in West Virginia served by it and its other public services of gas, alleged (Rec., 1825):

"That petitioner, as is its bounden duty, furnishes, and is ready and willing to furnish, at uniform and reasonable rates, natural gas for heating, illuminating, fuel, power, and other purposes

> to every inhabitant of the several incorporated cities and towns above named who applies therefor, and complies with the regulations prescribed by the ordinances of such of said cities and towns as have fixed ordinances authorizing the same, and who complies with the regulations fixed by the council of such of said towns as have not a specific ordinance, and also furnishes and is willing to furnish all other consumers therewith, at uniform and reasonable rates."

The Reserve Gas Company stated its attitude in language substantially identical with that of the Hope Natural Gas Company in the quotation immediately preceding (Rec., 1805).

(5) With respect to their pipe lines, the public professions of the seven companies are found in their many applications for leave to condemn made to the courts in the gas-producing counties, specimens of which are exhibited in the record at pages 1802 to 1916. In substance these applications set forth their extensive service of gas to West Virginia consumers; the necessity of obtaining a greater supply for them and the drilling of wells for that purpose; the necessity of laying a pipe line or lines for the purpose of transporting such additional gas to said West Virginia consumers and of condemning over the particular land described, and that the construction of said pipe line is necesary for public use and the same, when constructed, will be so used. Thus the form of application used by the Hope Natural Gas Company and Reserve Gas Company alleged (Rec., 1826):

> "That it became necessary for petitioner in

order to supply natural gas to the said several incorporated cities and towns, and their inhabitants, as well as the several other [illegible]vns, individuals, firms, corporations, copartners[illegible]tc., for heating, fuel, illuminating, power, and [illegible]r purposes, and to keep up the required and necessary supply of such gas, that it discover and produce an additional supply of natural gas; that to discover and produce the same, it became necessary for petitioner to drill, at large cost and expense, new wells for the purpose in the county of Harrison and several other counties in the State of West Virginia, and to acquire other wells in said counties; and that petitioner has drilled several new wells in said several counties and has discovered and found a large supply of natural gas in the said wells, and has acquired sundry other wells producing natural gas. That from said wells so drilled by it, as well as from said wells so acquired by it, petitioner produces natural gas with which to supply the said incorporated cities and towns and the said inhabitants thereof, aforesaid, as well as said other purchasers and consumers. And that in order to supply said incorporated cities and towns and the inhabitants thereof, as well as other consumers and prospective consumers in Harrison County, and elsewhere, with such natural gas produced from said last-mentioned wells, for heating, illuminating, and other purposes, it is necessary that petitioner lay, construct, and maintain an additional line of pipe from some of the wells in said several counties, through a portion of said Harrison County and portions of other counties in the State of West Virginia, so as to

reach the above-mentioned incorporated cities and towns, and the inhabitants thereof, as well as said other consumers in Harrison County and elsewhere, with said pipe line for the purpose of transporting such natural gas; and it is also necessary that petitioner transport such natural gas through said pipe line, and supply the same for said purposes to said incorporated cities and towns, and the inhabitants thereof, and said other consumers in said Harrison County and elsewhere."

(6) Further urging their public service to the people of the State, the seven companies applied for and were given, in addition to their franchises for use of the streets and alleys of the cities, towns, and villages in West Virginia served by them, the right to lay, maintain and operate pipe lines, connections, boxes, valves and other fixtures, as well as telephone and telegraph lines, along and upon the highways (Rec., 70, 74, 246, 247, 382, 386, 519, 1016, 1017, 1174; *Hardman vs. Cabot*, 60 W. Va., 664, 55 S. E., 756). A large part of their several pipe-lines and transportation systems are thus construed and now used without charge or compensation whatsoever. For an example of the franchises for use of the public highways see W. Va. Ex. No. 52 (Rec. 1917), granting to Reserve Gas Company:

> "License and permission to lay and maintain in any of the public roads of this county pipe lines for the conveyance of gas from any well or wells of the said company, said pipe lines to be so laid as not to interfere with the use of said public roads and for that purpose to be covered with a covering of not less than twelve inches above said pipe line and also to be laid in such manner as not to inter-

fere with any other pipe line, now laid in or along said road. If at any time, by reason of working the roads it should become necessary to lower said pipe, at any point, said company shall lower it at its own expense. This franchise is to expire in fifty years from the date hereof."

And in this connection it is pertinent to mention that many of these franchises, and special rights and privileges therewith, as well as the pipe lines constructed thereunder, were acquired by the seven companies through their absorption of local companies.

Violation of Seven Companies' Duties to West Virginia.

These seven companies, through which the plaintiff States derive West Virginia gas and whose alleged rights are so extensively relied on in assertion of the claims of the plaintiffs, have, in manifest disregard of their duties and obligations to West Virginia and its people:

(1) Engrossed the gas supply of the State.

(2) Absorbed important local companies, which, if independent, would have continued to serve West Virginia consumers.

(3) Deprived the remaining local companies of their ability to supply adaquately their localities.

(4) Failed and refused to furnish in later years, when the deficiency of the local companies became acute, gas to make good the deficiency, except out of any surplus remaining after satisfying consumption in other States.

(5) Failed and refused themselves to supply

needed gas to consumers in the territory of their production or their transportation lines.

(6) Subjected to suffering and inconvenience in homes and public institutions and to industrial loss the people of West Virginia.

(7) Transported for consumption out of West Virginia the gas required for reasonably adequate service therein.

(8) Transported their gas for consumption in other States under color of contracts which (except as to the theoretical provision in favor of West Virginia domestic consumers) subordinated the service of West Virginia consumers to the service of the out-of-state gas companies and consumers.

(9) Aided and abetted by the tenor and intent of their contracts and by their practices the unlimited increase of use of West Virginia gas in the other States by providing for the extension of service to additional consumers there.

(10) Arrogated their contracts to superiority over the pre-existing laws of West Virginia, to which they owed their existence and special rights and privileges.

(11) By the contracts and transportation above mentioned, renounced their obligations and duties to West Virginia and disabled themselves from the performance thereof.

Gas Control of the Seven Companies.

As already shown, in 1919 the total gross production in the State by all producers was 219,886,837 M. cubic feet, of which, after deducting the free gas to lessors, gas used in the field, and gas produced and con-

sumed by private industries (which items do not reach or benefit the consuming public), there was a residue of 183,687,047 M. cubic feet, constituting the net supply in the hands of the public service corporations of the State available for service to the public. Of this net public supply, the seven companies produced from their own wells or acquired under purchase contracts a total of 164,426,341 M. cubic feet, or 89.5 per cent. The following table (Rec., 996, 1736, insert p. 414) shows that the like control has existed since 1911:

Year	Net Supply for Public Service	Net Supply of Seven Companies	Per Cent.
	M. Cu. Ft.		
1911	173,132,353	147,431,246	85.1
1912	203,112,738	172,050,962	84.7
1913	209,131,295	167,897,746	80.3
1914	200,762,645	166,625,730	83.0
1915	207,777,882	170,694,495	82.1
1916	259,414,200	220,892,583*	85.1
1917	245,620,686	223,517,777	91.0
1918	227,649,823	201,685,702	88.6
1919	183,687,047	164,426,341	89.5

But the control of the West Virginia gas situation by the seven companies is still further manifest.

The total acreage of gas territory controlled by producers in West Virginia and the other States from 1910 to 1918, as shown by the United States Geological Sur-

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*The figure 200,892,583, on Record page 996, is a typographical error. See Rec., 1736, insert p. 383.

vey (the figures for 1919 not being available when the evidence was taken), was (Rec., 1000):

	West Virginia	Ohio	Pennsylvania	Total
1910	3,348,286	1,423,351	1,949,733	6,721,370
1911	3,399,213	1,643,228	2,032,772	6,075,213
1912	3,019,316	1,756,167	2,187,388	6,962,875
1913	3,155,751	1,515,562	2,211,440	6,882,753
1914	3,091,506	1,361,778	2,153,119	6,606,403
1915	3,184,245	1,519,229	2,174,403	6,877,878
1916	3,866,373	1,558,231	2,398,118	7,822,722
1917	3,787,185	2,260,028	2,436,029	8,483,242
1918	3,318,896	2,561,423	2,410,310	8,290,630

The total acreage in West Virginia, operated and unoperated, held by all the sixty-seven public service companies in 1919, was 2,725,798 acres, of which the seven companies together held 2,566,798 acres, or 93.8 per cent., of which 1,866,720 acres were undeveloped and 739,184 acres developed, while the other public service companies held 169,733 acres, of which 119,894 acres were undeveloped and 49,879 acres developed (Rec., 1000-1005).

For the years 1910 to 1919, the aggregate acreage of the seven companies was as follows, (Rec., 1736, insert p. 390; 1003):

Year	Developed	Undeveloped	Total
1910	311,569	2,639,509	2,951,078
1911	351,428	2,382,846	2,734,274
1912	467,664	2,027,469	2,495,133
1913	533,593	2,055,968	2,589,561
1914	572,043	1,852,319	2,424,362
1915	509,414	2,045,032	2,554,446

1916	559,078	2,281,435	2,840,513
1917	618,559	2,152,500	2,771,059
1918	658,880	1,872,843	2,531,723
1919*	689,305	1,866,720	2,556,025

In addition to the acreage directly held under lease, the seven companies indirectly control much other territory by means of purchase contracts for the gas production of a great number of oil companies and other independent producers. Thus, in 1919, of the 245 independent producers selling their gas to the 67 West Virginia public-service corporations, the seven companies acquired the production of 202 of such producers, holding oil and gas leases upon an aggregate of 1,316,807 acres, while the remaining 60 public-service corporations acquired the production of 53 of such operators, holding leases upon 11,394 acres (Rec., 1471-1473).

The total number of producing gas wells in West Virginia at the beginning of 1919 (according to the United States Geological Report for 1918) was 9,687, of which the seven companies owned 7,086, or 73.2 per cent. The additional wells held under contracts with independent producers is not disclosed in the evidence, but a fair inference can be drawn from a con-

*An exhibit filed by the plaintiffs (Pa. Ex. 31, Rec., 1568) assigns to the seven companies 2,954,120 acres, of which 2,169,310 acres, or 73.43%, are unoperated, and 754,810 acres, or 26.57% operated; and to 20 small companies 27,619 acres, of which 10,317 acres, or 37.55% are unoperated and 17,302 acres, or 62.65% are operated. Another tabulation (Pa. Ex. 27, Rec., 1566, insert p. 142), assigns to the seven companies 2,534,673 acres, of which 1,875,437 acres are unoperated and 659,236 acres operated; to the other public service companies 191,015 acres, 142,245 acres operated, and 48,770 acres unoperated.

sideration of the number and extent of territory of the independent producers from whom they purchased, as stated in the preceding paragraph. The total of producing gas wells in the State and the number thereof owned by the seven companies during the years 1910 to 1918 was as follows (Rec., 1021):

Year ended Dec. 31	Total, All Producers	Seven Companies	Per Cent.
1910	4,052	2,890	71.3
1911	4,790	3,351	70.0
1912	5,604	3,897	69.6
1913	6,534	4,578	70.1
1914	7,194	5,037	70.0
1915	7,718	5,458	70.7
1916	8,542	6,161	72.1
1917	9,329	6,763	72.5
1918	9,687	7,086	73.2

For 1919, evidence of the plaintiffs gives a total of 8136 wells, of which the seven companies had 7220 wells and the other public service companies listed, 816 wells (Rec. 1566, insert p. 142).

Added to this control of the sources of supply, and accounting in a large degree for it, is the control of the gas markets built up by means of, and dependent on, the pipe line systems and the compressor stations essential for the transportation of gas to consumers at a distance from the place of production. These pipe lines and stations are themselves, in fact, a monopoly resulting from the command of the large capital, not available to everyone, required to erect them and from the holding of the large areas of gas territory and large amounts of gas production, tributary to the pipe lines

and withdrawn by the seven companies from acquisition by others (Rec., 1016, 1279, 1310, 1329-1336, *et seq.*).*

Nor is this situation altered by the statute, already quoted, of West Virginia, enacted in the year 1891 and yet in force, providing that any company organized for the purpose of transporting natural gas by pipe lines should be considered and held to be a common carrier (*Code W. Va.*, Chap. 52, Sec. 24). The seven companies at all times have refused to transport any gas except their own production and purchases, claiming that to do so would disable them from the public service of gas obligatory upon them as public-service corporations (Rec., 1425-1426, 312, 315, 352, 1257). In this regard the situation is pertinently described by a short passage from *United States vs. Ohio Oil Co.*, 234 U. S., 548, 559, the language there used in relation to oil being equally applicable to gas:

> "Availing itself of its monopoly of the means of transportation the Standard Oil Company refused, through its subordinates, to carry any oil unless the same was sold to it or to them, and through them to it, on terms more or less dictated by itself. In this way it made itself master of the fields without the necessity of owning them, and carries across half the continent a great subject of international commerce coming from many owners,

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*The compressor stations of the Hope Natural Gas Company range from 60 to 22025 horse-power, and cost about $150 per horse-power. Its Hastings station cost over $1,000,000 (Rec., 307, 248, 249). The compressor stations of the Reserve Gas Company are from 1500 to 7600 horse-power (Rec., 325).

but, by the duress of which the Standard Oil Company was master, carrying it all as its own."

METHODS OF ACQUISITION OF CONTROL BY THE SEVEN COMPANIES.

In the early days gas territory, both proven and prospective, was available for whomsoever desired to lease. The great majority of the local companies, serving many municipalities and communities in the gas-producing counties, obtained an abundant supply from wells in the immediate vicinity, and acquired only relatively small areas of gas. The seven companies, however, with the foresight and ability to acquire and hold for future realization, common to such combinations of capital, acquired in the aggregate very large areas of gas territory, much of it proven to be productive of gas, and much of it appearing to be valuable in prospect. Much of this acreage was acquired and held as a reserve for future supply, and, although these reserves have since been depleted to a considerable extent, the seven companies yet held in 1919 an aggregate of 1,-866,720 acres of undeveloped territory out of their total of 2,566,025 acres (Rec., 1736; insert, p. 390; 1003).

A large part of the gas territory was obtained by direct leases from the land-owners, but the seven companies also acquired a large part of their holdings by the acquisition of other West Virginia public-service gas corporations engaged in the marketing of natural gas, thus eliminating the competition of the latter companies and depriving them of their ability to supply the West Virginia public. This was particularly true of

the Hope Natural Gas Company, a gas subsidiary of the Standard Oil Company in West Virginia, which from time to time took over all of the Standard gas interests in northern and north-central West Virginia theretofore developed and marketed by four other subsidiaries, the South Penn Oil Company, Carter Oil Company, Flaggy Meadow Gas Company, and the Mountain State Gas Company, which had been formed to supply Parkersburg and Sistersville, West Virginia, (Rec., 322, 340-342 *et seq.*, 1173, 1329). The first two were extensively engaged in the oil business and held, especially the South Penn, very great acreages of oil and gas leases in many counties, and in the course of oil explorations had encountered and held many gas wells, while the last two companies were chartered and operated as West Virginia public-service corporations for the purpose of marketing the gas so developed, the Flaggy Meadow Gas Company serving consumers in various municipalities of Marion, Harrison, and Wetzel counties, and the Mountain State Gas Company serving consumers in municipalities of Harrison, Lewis, Doddridge, Wood, Pleasants, Tyler and possibly other counties. In this manner the gas territory, wells, pipe lines and other property of the other oil and gas subsidiaries passed into the hands of the Hope Natural Gas Company and formed part of, and a large nucleus around which were acquired and built up, its present system and immense holdings. In 1910, the Hope Natural Gas Company also purchased all of the gas territory, wells, pipe lines and gas-purchase contracts of the Wheeling Natural Gas Company and Tri-State Gas Company, both West Virginia public-service corporations, in Harrison, Lewis, Gilmer, Upshur, Brax-

ton, and part of Marion County (Rec., 1169-1172, 272-274), in return for a gas-sales contract to the Manufacturers Light & Heat Company, which had theretofore acquired control of the Wheeling and Tri-State Companies (Rec., 1712)*. To this day the Hope Natural Gas Company in northern West Virginia and the United Fuel Gas Company in the southern section receive substantially all the wells, or the gas from wells, discovered by these two large oil companies, the South Penn Oil Company and the Carter Oil Company (Rec., 999, 1019, 1445-7, 1467 *et seq.*), which together hold in West Virginia, 800,616 acres of oil and gas leases (Rec., 1467-1470). The Hope Natural Gas Company also purchased the properties of other smaller gas companies (Rec., 268-270).

The Pittsburgh & West Virginia Gas Company was originally incorporated under the laws of West Virginia as the Fairmont & Grafton Gas Company. It was one of the largest and earliest public-service corporations in the northern section of the State, serving Fairmont, Grafton, Shinnston, Lumberport, and other municipalities in Marion, Taylor and Harrison counties and having a very considerable acreage of gas territory, with many wells and pipe lines through those counties (Rec., 512-513, 1030, 1895-1898). In 1906 its capital stock was acquired by The Philadelphia Company of Pennsyl-

*The Hope Natural Gas Company in 1910 took over from the Mountain State Gas Company 23,610 acres of leases in Ritchie, Gilmer, Wirt and Tyler Counties, and franchises from Parkersburg, Sistersville, St. Marys and County Courts; and in 1911 from the Wheeling Natural Gas Company 65,000 acres of leases in Harrison, Lewis, Marion and Gilmer Countries, gas from 9,839 acres, 100 rights of way and 177,876 feet of pipe lines (Rec., 272-274, 1170, 1173).

vania, which had therefore entered the State through a West Virginia subsidiary chartered as The Philadelphia Company of West Virginia, and acquired territory, drilled wells, built pipe lines and engaged in the marketing of natural gas as a public-service corporation of the State. These two subsidiaries were connected and thence operated as one until 1913, when the name Fairmont & Grafton Gas Company was changed to Pittsburgh & West Virginia Gas Company, and to it the property of The Philadelphia Company of West Virginia was turned over (Rec., 512).

The Manufacturers' Light & Heat Company entered West Virginia through the acquisition of all or the controlling interest in the capital stock of West Virginia public-service corporations, whose property and marketing systems were thereupon connected with its general system. The companies so acquired were Wheeling Natural Gas Company, Ohio Valley Gas Company, Wetzel Gas Company, Tri-State Gas Company, Cameron Gas & Oil Company, New Cumberland Water & Gas Company, and Manufacturers' Gas Company of Wheeling; and until about 1910 all were operated as subsidiaries (Rec., 1029). In that year, all their outstanding stock having been acquired, they were merged into the parent company, which then for the first time formally entered the State (Rec., 65, 94).

In the southern section of the State the United Fuel Gas Company, a West Virginia corporation, was chartered in 1903 and leased a considerable gas territory. Until 1915 its stock was owned by the Standard Oil Company and Ohio Fuel Supply Company, the

Standard having control. Its chief expansion came in 1909 with its acquisition of the United States Natural Gas Company, a West Virginia corporation, which was itself a merger of a number of earlier West Virginia companies holding large acreages and engaged in the service of Charleston, Huntington and many other cities and municipalities in the southern section; and it also took over a great block of leases in that section from the Hope Natural Gas Company. In June, 1915, the Standard Oil Company disposed of its controlling stock interest in the United Fuel Gas Company to the Columbia Gas & Electric Company, and since then the two latter companies have been substantially operated together and under the same management (Rec., 382 *et seq.;* 1029-1033). The Ohio Fuel Supply Company owns the other stock in the United Fuel Company.

Contracts for the purchase of gas from independent operators were another means of engrossing the gas supply. But affording a powerful, and, in many cases, a compelling leverage in the negotiation of sales to the seven companies were the pipe-line systems and latterly the compressor stations. As the cost of pipe lines was practically prohibitive to the independent producer—and much the more so to the landowner himself—and as the independent producer and landowner could not hold their gas for future development or investment, because it was apt to be drained away through wells drilled on neighboring lands, operated by one of the seven companies, their only course was, in general, to sell or lease their gas to one of the seven companies upon terms and conditions made by it. (Rec., 307, 248, 249; 1019, 1020, 1254-1257, 1270, 1273, 1300, 1308, 1330-1334, 1338-

1340, 1346, 1360-1362). As already stated, the condition was like that shown to exist in *United States vs Ohio Oil Co.*, 234 U. S., 548, 559.

The pipe-line systems thus became the market for the independent producers, substantially all of whom sold to the seven companies.* The same liability to loss by drainage through neighboring wells likewise deterred independent operators and local public-service corporations from taking up and carrying leases for future development or investment, while the landowner, moved by the same considerations, could not withhold his land from leasing. Thus the seven companies were enabled at once to discourage competitive leasing and to build up their reserves and control of the available territory. Nor was this condition changed by the subsequently increased demand for gas and increased prices paid therefor in many of the West Virginia cities located in the gas territory; for, insofar as the gas was not held by the seven companies, the increased demands and prices were met and overcome by the increased cost of transportation, due to the decline in rock pressure to the point where the gas ceased to be self-transporting, thus necessitating the additional and prohibitive cost of compressor stations (Rec., 1254-1257, 1269, 1270, 1300, 1330-1334, 1339-1340, 1346, 1359).

In the case of the oil companies which are included in the category of independent producers, even if possessed of the means to build and operate pipe lines and compressors, the scope of the enterprise and the prox-

*The seven companies bought of 202 independent producers, and the other 60 public service companies from 43 independent producers in 1919 (Rec., 1471-1473, 1019).

imity of the pipe lines have occasioned the same result. Such companies incidentally discovering gas while operating for oil, but not being engaged in the business of transporting gas, their only market has generally been the pipe lines of the seven companies in the vicinity of production. Substantially all the oil companies sell most of their gas to the seven companies, and many of them operate upon an extensive scale and hold large acreages. For example, the South Penn Oil Company (Rec., 1444, 1445), Carter Oil Company, Ohio Fuel Oil Company (Rec., 1079), and Pure Oil Company (formerly Ohio Cities Gas Company), Commonwealth Petroleum Company, Fisher Oil Company and Southern Oil Company, all of which sell to the seven companies and most of which are allied in interest with them, together hold 1,147,637 acres, primarily for oil development, but upon which gas is frequently discovered (Rec., 998, 1467-1474).

INSTRUMENTALITIES OF GAS EXPORTS.

Although limited quantities had been from early days marketed along the border lines from West Virginia into Ohio and Pennsylvania, and *vice versa*, especially in the Northern Panhandle of West Virginia, the business of exporting seems not to have reached an extensive scale until about 1902 or 1903. At and for some years before that time the defined gas fields of West Virginia afforded a large surplus over and beyond the demand of its people, and explorations had indicated the probability of productive territory to the southward (Rec., 322). In the meantime the gas fields of Western Pennsylvania had been developed and util-

ized generally for domestic and industrial fuel at an earlier date and to a larger extent than those of West Virginia, chiefly by reason of the larger cities and population and the greater quantities consumed by the steel plants and other industries of Pittsburgh and that section of Pennsylvania. As already stated, these fields began to decline and their production became insufficient to supply Pennsylvania consumers. In like manner the smaller and somewhat scattered gas fields of Ohio, never sufficient to supply more than a small part of the local consumers, also began to decline. In addition to which there were in Ohio many large cities and centers of industry served by local plants with artificial gas, to which the more efficient fuel of natural gas was attractive (Rec., 60-63, 438, 521-524, 543-557, 669, 719, 726, 749, 947). The Indiana fields were depleted. And thereupon commenced the process of expansion of the West Virginia gas industry, which later assumed the proportions of wholesale exploitation.

In disposing of their gas in the other States, the financial resources of the seven companies and their allied or controlling interests played an important part. The deficiency in its own supply in Pennsylvania provided a direct and ready market for the supply of the West Virginia companies acquired by the Manufacturers Light & Heat Company. The Carnegie Natural Gas Company extended its lines through West Virginia to the Pennsylvania line to connect with its system in that State and marketed its surplus production into the steel plants of its parent company, the United States Steel Corporation. The Pittsburg & West Virginia Gas

Company, or its predecessor companies of earlier years, all owned by The Philadelphia Company, laid lines to the Pennsylvania border and there sold and delivered its surplus to the Equitable Gas Company, another subsidiary, which in turn transported to and supplemented the waning supply of the various other subsidiaries marketing to Pittsburgh and elsewhere in Western Pennsylvania.

The West Virginia companies owned or controlled by the Standard Oil Company, viz., the Hope Natural Gas Company and the Reserve Gas Company, adopted a different method. The gas was sold under long-term contracts and delivery made at the State line to purchasing companies in Ohio and Pennsylvania, such as the Peoples Natural Gas Company, the East Ohio Gas Company and the Northwestern Ohio Natural Gas Company, which laid lines from those States to the West Virginia boundary and thence transported and sold the gas, in some instances directly to consumers, and in other cases to local distributing companies, generally subsidiaries, which in turn distributed to consumers in Ohio, Pennsylvania and as far west as Indinana. In part, these purchasing companies were theretofore engaged in the natural-gas business in said other States and had established markets, as was the case with the Peoples Natural Gas Company, and the Manufacturers Light & Heat Company, which had extensive markets in Pennsylvania and with which the Hope Natural Gas Company contracted in 1910 for future deliveries of large quantities of gas, substantially all of which went to Ohio and Pennsylvania consumers.

Markets were created by the incorporation of subsidiaries of the larger interests controlling certain of the seven companies, which subsidiaries constructed pipe lines to the West Virginia border and transported the gas there purchased and received from the West Virginia companies to municipalities in Ohio, Indiana and Kentucky not theretofore using natural gas. This last was the case with the East Ohio Gas Company, an Ohio corporation owned by the Standard Oil Company, which first acquired the franchises and distributing plants of the artificial gas companies serving the cities of Akron and Canton, in the State of Ohio, and later in Cleveland. It built pipe lines to the West Virginia State line to receive deliveries from the Hope Natural Gas Company, also a subsidiary, and transported and served the gas there received to consumers through the artificial gas distributing plants so acquired, and also to consumers in other municipalities in the territory through which its pipe lines were constructed. So also, through the relationship of the United Fuel Gas Company, Columbia Gas & Electric Company and Ohio Fuel Supply Company, and of the Union Natural Gas Corporation, Reserve Gas Company and Logan Fuel and Supply Company, the use of West Virginia gas was introduced into Cincinnati and other cities in Ohio and Indiana, as well as into Louisville and Covington and other municipalities in Kentucky. Further supplies from West Virginia were used to supplement the insufficient production of local companies theretofore serving Dayton, Columbus, Springfield, Toledo and other cities of Ohio and Indiana.

The purchasing companies, thus supplied with West Virginia gas, seeking to increase their business, em-

barked upon a career of ill-regulated extension of their service. (Rec. 21, 424, 431, 486, 800). The statistics of consumers and consumption of these companies, contained in the record, afford repeated illustrations. It is enough to refer to the increase of the consumers of the Peoples Natural Gas Company from 43,315 in 1910 to 79,112 in 1919 (Rec. 614-616), and the threefold expansion of its area of service from 1903 to 1919 (Rec. 431); the increase of the East Ohio Gas Company's consumers from 161,580, using 26,445,512 M cubic feet, in 1910, to 329,005 consumers using 43,469,893 M in 1919; and the increase of the Philadelphia Company's consumers from 16,000 to 144,963, between 1899 and 1919 (Rec. 486, 497).

The various transporting, distributing subsidiary and allied corporations involved in the contracts and arrangements under which transportation and service were made, and the numerous cities and municipalities included in the upbuilding of these markets, in Ohio, Pennsylvania, Kentucky and Indiana, are too numerous and complex to justify further detail here. They are partly referred to elsewhere in this brief. It suffices to say that between the year 1902 and the winter of 1916-17, when the shortages of West Virginia consumers commenced, the seven companies, in addition to the large amounts directly transported out of the State by certain of them, delivered an enormous aggregate of natural gas from the West Virginia fields to many purchasing companies, who transported and sold the same, either directly or through other companies, to consumers in municipalities and communities in Ohio, Pennsylvania, Kentucky and Indiana, under contracts

severally made by the seven companies with the other companies to whom they delivered the gas.

Gas-Sales Contracts.

The principal gas sale contracts above mentioned were and are as follows:

The *Hope Natural Gas Company* so contracted with the following:

1. The Northwestern Ohio Natural Gas Company, which serves Toledo and other cities in Ohio (Rec., 1509). This contract covers the majority share of the production of the Reserve Gas Company, which is sold or taken over by the Hope Natural Gas Company, its allied company. The remaining export gas of the Reserve Gas Company is sold and delivered by its other stockholder, the Union Natural Gas Corporation, to its subsidiary, the Logan Natural Gas & Fuel Company, which serves or sells to local companies serving Athens, Chillicothe, Dover, Logan, Newark, Dayton, and other municipalities in Ohio, and Richmond, Muncie and other places in Indiana (Rec., 319, 321, 749 *et seq*).

2. The Peoples Natural Gas Company, which serves a portion of Pittsburgh and other cities in Western Pennsylvania (Rec., 1524).

3. The East Ohio Gas Company, which serves Akron, Dayton, Cleveland and other cities in Ohio (Rec., 1544).

4. The River Gas Company, which serves Marietta and other Ohio cities (Rec., 1554), this contract being made by the Mountain State Gas Company and subsequently assumed by the Hope Natural Gas Company on its taking over the former company.

5. The Fayette County Gas Company, which serves Uniontown, Connellsville, and other cities in Western Pennsylvania (Rec., 1560).

The *Pittsburgh & West Virginia Gas Company* so contracted with the Equitable Gas Company, which serves consumers in Pittsburgh and other cities in Western Pennsylvania (Rec., 1729).

The *United Fuel Gas Company* so contracted with:

1. The Louisville Gas & Electric Company, which serves the City of Louisville, Kentucky, and vicinity (Rec., 1738).

2. The Portsmouth Gas Company, which serves the City of Portsmouth, Ohio (Rec., 1745).

3. The Central Kentucky Natural Gas Company, which serves Frankfort and other municipalities in Kentucky (Rec., 1752).

4. The Ohio Fuel Supply Company, which serves Columbus, Cincinnati, Toledo, Zanesville and other Ohio municipalities (Rec., 1761).

5. The Columbia Gas & Electric Company, which serves Cincinnati, in Ohio, and Covington, in Kentucky, and their vicinities (Rec., 1791).

In addition to the foregoing, there were and are a number of similar contracts for sales and deliveries within the State of West Virginia of large quantities of gas by certain of the seven companies to others of the seven, the major portion of which deliveries is either transported and sold directly, or sold and delivered to other companies at the State line under the contracts above listed, which transport to consumers in Ohio, Pennsylvania and Kentucky. Thus the Hope Natural

Gas Company so contracted with the Manufacturers Light & Heat Company for a large supply, the major portion whereof the latter company transports and markets in Pennsylvania, with a small part in Ohio and another small part in West Virginia (Rec., 1712). The United Fuel Gas Company so contracted with the Hope Natural Gas Company (Rec., 1769, 1776, 1777) and with the Pittsburgh & West Virginia Gas Company (Rec., 1780-1788), which vendee companies in turn sell and deliver the major portion of the quantities so purchased to other companies at the State line under the contracts above mentioned.

These contracts contain a number of provisions more or less common, though in varying language. Among the most important in their bearing on this litigation may be pointed out the provision, found in most of them, that the amount of gas delivered shall be sufficient to supply all the then domestic consumers of the purchasing companies, as well as all those which may be thereafter acquired, throughout the term of the contracts, together with a frequently added covenant by the purchasing companies to use their best efforts to extend their service; the provision for payment, in some cases, in the form of a percentage of the gross receipts of the purchasing companies from their consumers, thus directly interesting the vendor companies in the marketing in other States; and especially the provision whereby the vendor companies are compelled to deliver the contract quantities in preference to all other purchasers or consumers, save only the domestic consumers of the vendor company then on its lines in West Virginia, thereby disabling themselves from serving gas

for the other public uses of heating and lighting schools, churches, hotels, hospitals, municipal and other governmental buildings, and all industrial use. (See, for example, Rec., 1533, 1546). And in this connection it is important to remark that all of the companies purchasing from the seven companies market a portion of the gas for industrial use, and that, as we shall later observe, the contracts of purchase contemplate industrial consumption by consumers of the distributing companies.

In the light of the contention of the plaintiffs that the obligation of these contracts is impaired by the Act of 1919, and also as manifesting the anticipation of the contracting parties that the decline and ultimate exhaustion of West Virginia gas was inevitable, further elements of these contracts are important:

1. The reserved priority to West Virginia domestic consumers and in some instances to domestic consumers in other States. (Rec., 1533, 1534, 1546, 1547, 1556, 1565, 1744, 1748, 1759, 1764, 1773, 1796).

2. The apportionment of gas between certain purchasing companies, in case of insufficiency of the vendor's gas. (Rec., 1553, 1547).

3. The preference of supply reserved to some purchasing companies over others. (Rec., 296, 2971, 1533, 1546, 1547, 1565, 1744, 1748, 1759, 1764, 1774, 1785, 1786).

4. The limitation of the vendor's obligation to the extent of its gas supply and against liability for failure of supply not due to its fault. (Rec., 1510, 1511, 1520, 1522, 1539, 1541, 1546, 1555, 1564, 1565, 1743, 1744, 1748, 1750, 1758, 1759, 1763, 1764, 1773, 1774, 1785, 1795, 1796).

Pipe Line Systems and Commingling of Gas.

The gas of the seven companies going to Ohio, Pennsylvania and other States is transported by, and delivered out of, their general pipe-line systems, which, in general, are not confined to interstate transportation. These systems, which are more or less welded into one by the connections of the seven companies among themselves, constitute a reservoir, both to receive gas and to transport and distribute it. Throughout the gas-producing counties, from the interior of the State to its boundaries, the gas is fed into the main pipe lines by smaller lines leading mediately or immediately from the wells, and gas is fed out through distributing lines leading to the consumers or communities served along the lines. Whether consumed in West Virginia or in other States, the gas is commingled and carried in the same trunk lines. And the process of feeding by gathering lines and feeding out by distributing lines continues substantially to the limits of the State. (Rec., 33, 70, 99, 108, 110, 245, 246, 309, 310, 380, 381, 383, 387, 392, 394, 466, 518).

When fed into the pipe-line system from a particular well, or from wells in a particular section, the gas is at once commingled into a common and homogeneous stock. From its very nature, no mark of identification can ever be placed upon, nor is it possible to identify, any atom or specific quantity thereof. And so it is that, until in the progress of the gas through the trunk lines the last connection of a pipe devoted to local service in West Virginia has been passed, it is not and cannot be ascertained whether any particular part of the gas,

in the aspect of a physical entity, will be consumed in West Virginia or will pass to and be consumed in another State (Rec., 381, 384, 933).

The situation is sufficient set forth in the following excerpt from the testimony of the plaintiffs' engineer Wyer (Rec., 933, 934):

"Q. In the case of a well feeding into a line, which line in turn carries gas partly to points of consumption in West Virginia, and partly to points of consumption in Pennsylvania and Ohio, does that gas have any label on it?

A. It does not. There is no original package, no identity, nothing to distinguish ownership, all intermingled.

Q. Well, how do you find out then where this gas is going when it comes out of the well and finds its way into a line?

A. Well, for any particular well in West Virginia, it might be very difficult—in many cases absolutely impossible—to tell, the way the well is connected to some of these large trunk lines, whether that gas is ultimately going to get to Pennsylvania, or Ohio, or, in other cases, whether it is going to get to Ohio or Indiana.

Q. In a company like the Hope Natural Gas Company, which is supplying gas partly in West Virginia, and supplying it partly to companies which in turn supply the other States, can you tell when that gas starts on its continuous journey, as you call it, from the well, where that gas is going?

A. No, sir.

Q. Can anybody?

A. No, sir. That is, I mean, you could not state that this particular thousand feet of gas is going to be used in West Virginia, and this particular thousand feet of gas in the Hope property, will be used through the Peoples Company in Pennsylvania, and this one through the East Ohio Company in Ohio. The gas is all intermingled, without any chance for identity.

Q. And where does the opportunity first occur for identifying the gas which is going into Pennsylvania or Ohio or any other States?

A. There would be no chance for identifying the gas from particular individual wells. The only gas that you could identify would be the gas passing the measuring station at the State line, and that would be merely a total volume measurement giving you the total volume passing that point, without any relation as to whether it came from any particular well in West Virginia."

The main pipe lines of some of the seven companies extend only to the State boundary (Rec., 190, 196, 210, 317, 319, 394, 514), while in other instances the pipe lines reach into the adjacent States. The West Virginia gas furnished by the Hope Natural Gas Company, Reserve Gas Company and Pittsburgh & West Virginia Gas Company, no one of which operates outside of West Virginia, is all delivered to the purchasing companies at, or practically at, the State line. (Rec., 303,

304, 317, 318, 514, 1529, 1524, and see 1555). Of the total amount sold under contract by the United Fuel Gas Company to other companies, about one-fifth is delivered just across the State line in Kentucky and Ohio and the remaining four-fifths are delivered in part to the Ohio Fuel Supply Company at the State line (Rec., 1762), but in the much greater part at points within the State to others of the seven companies, viz., the Columbia Gas & Electric Company (Rec., 1793), Hope Natural Gas Company (Rec., 1770, 1772), and Pittsburgh & West Virginia Gas Company (Rec., 1780-1782), which receive such deliveries into their general system. The Manufacturers Light & Heat Company (Rec., 1712, 1716) and Columbia Gas & Electric Company, while both producing and marketing in West Virginia, acquire much the greater part of their respective supplies in West Virginia under their purchase contracts from the Hope Natural Gas Company and United Fuel Gas Company, above mentioned, and thereupon transport out of the State; the Manufacturers Light & Heat Company about four-fifths of its entire net supply, and the Columbia Gas & Electric Company substantially all (Rec., 1736; insert, 380, 415). The Carnegie Natural Gas Company has no contracts for out-of-state deliveries, but transports and markets directly to the steel works of its parent company in Pennsylvania.

Use of Gas in Other States.

In all the States here involved, West Virginia, Ohio and Pennsylvania, as well as in Kentucky and Indiana, gas is used for both domestic and industrial consumption.

Of the West Virginia gas exported to the other States, much was and is furnished directly to manufacturers and other industrial consumers. In other cases, West Virginia gas was and is utilized to supply the domestic consumption of purchasing companies, whose own production was and is diverted to industrial service. This diversion is expressly contemplated under the contracts made by the Hope Natural Gas Company with Manufacturers Light & Heat Company and Peoples Natural Gas Company, above mentioned, and is impliedly contemplated and fully effectuated under the provisions of a number of the other contracts requiring the vendor companies to deliver all the natural gas needed to supply all of the present and future domestic consumers of the vendee companies (Rec., 1524, 1544, 1560, 1712, 1761).

Of the gas companies furnishing gas in the other States, substantially all supply gas for industrial consumption therein. The record embraces the following examples for the year 1919:

Manufacturers Light & Heat Company (Rec., 86, 87): In Pennsylvania, domestic, 7,966,544 M cubic feet; public institutions, 192,354 M; industrial, 5,757,124 M. In Ohio, domestic, 2,614,181 M cubic feet; public institutions, 54,800 M; industrial, 3,679,143 M. In West

Virginia, domestic, 1,084,023 M cubic feet; public institutions, 31,854 M; industrial, 3,293,747 M.

United Fuel Gas Company (Rec. 367, 377): Outside of West Virginia, (evidently by direct service, see Rec. 367, 377, 393), domestic, 1,491,447 M cubic feet; industrial, 2,507,654 M. In West Virginia, domestic, 4,336,112 M cubic feet; industrial, 6,986,926 M.

Peoples Natural Gas Company (Rec., 418): In Pennsylvania, domestic, 9,654,042 M cubic feet; industrial, 12,264,921 M.

Union Gas & Electric Company (Rec., 457): In Ohio and Kentucky, domestic, 12,400,000 M cubic feet; industrial, 1,800,000 M.

Philadelphia Company Subsidiaries (Rec., 513, 514, 527): In Pennsylvania, domestic, 18,569,553 M cubic feet; industrial, 13,758,717 M. In West Virginia, domestic, 554,350 M cubic feet; industrial, 3,123,804 M.

Fayette County Gas Company (Rec., 551): In Pennsylvania, domestic, 1,205,622 M cubic feet; industrial, 702,748 M.

East Ohio Gas Company (Rec., 625): In Ohio, domestic, 36,969,772 M cubic feet; industrial, 6,630,987 M.

Northwestern Ohio Natural Gas Company (Rec., 721): In Ohio, domestic, 5,689,621 M cubic feet; industrial, 313,948 M.

Columbus Gas & Fuel Company and allied companies in year ended March 31, 1920 (Rec., 740): In

Ohio, domestic, 13,310,970 M cubic feet; industrial, 1,790,396 M.

Hope Natural Gas Company (Rec. 234): In West Virginia, domestic, 2,512,816 M cubic feet; industrial, 3,869,729 M.

Reserve Gas Company (Rec. 411, 412, 414): In West Virginia, domestic, 78,429 M cubic feet; industrial (which includes field gas for itself and sold to other companies), 1,235,769 M.

Logan Natural Gas & Fuel Company (Rec., 794): In Ohio and Indiana, domestic, 8,895,399 M cubic feet; industrial, 4,545,050 M.

Carnegie Natural Gas Company (Rec., 172, 173, 849, 850, 925, 926): While no figures are given, substantially all of its gas is consumed by steel mills in the Pittsburgh district.

The following affords a comparison of the industrial consumption of some of these companies with their supplies produced and purchased in the States in 1919:

Manufacturers Light & Heat Company (Rec., 80, 81): In Pennsylvania, industrial consumption, 5,757,124 M cubic feet; Pennsylvania gas, 7,737,722. In Ohio, industrial, 3,679,143 M; Ohio gas, 100,679 M. In West Virginia, industrial consumption, 3,293,747 cubic feet; West Virginia gas, 19,385,381 M.

Peoples Natural Gas Company (Rec., 417): In Pennsylvania, industrial consumption, 12,264,921 M cubic feet; Pennsylvania gas, 14,699,552.

Philadelphia Company Subsidiaries (Rec., 494-496): In Pennsylvania, industrial consumption, 13,-758,717 M cubic feet; Pennsylvania gas, 9,134,864 M. In West Virginia, industrial consumption, 3,123,804 M cubic feet; West Virginia gas, 26,871,560 M.

Fayette County Gas Company (Rec., 551): In Pennsylvania, industrial consumption, 702,748 M; Pennsylvania gas (including all not purchased from Hope Natural Gas Company), 470,917 M.

East Ohio Gas Company (Rec., 539): In Ohio, industrial consumption, 6,630,987 M cubic feet; Ohio gas, 8,201,376 M

Northwestern Ohio Natural Gas Company (Rec., 718, 719): In Ohio, industrial consumption, 313,948 M cubic feet; Ohio gas, substantially none.

Columbus Gas & Fuel Company and allied companies (Rec., 629): In Ohio, industrial consumption, 1,700,396 M cubic feet; Ohio gas, 11,127,809 M.

Logan Natural Gas & Fuel Supply Company (Rec. 773, 794): In Ohio and Indiana, industrial consumption, 4,545,050 M cubic feet; Ohio gas, apparently 11,929,421 M.

Hope Natural Gas Company (Rec. 233, 234): In West Virginia, industrial consumption, 3,869,729 M cubic feet; West Virginia gas, 67,945,432 M.

Reserve Gas Company (Rec. 411, 412, 414): In West Virginia, industrial consumption (which includes field gas for itself and sold to other companies), 1,235,-769 M cubic feet; West Virginia gas, 22,178,819 M.

United Fuel Gas Company (Rec. 367, 377): Outside of West Virginia, industrial consumption, 2,507,654 M cubic feet; Ohio and Kentucky gas purchased (production not stated), 689,848 M. In West Virginia, industrial consumption 6,265,795 M cubic feet; West Virginia gas purchased (production not stated), 11,456,842 M.

The statistics for the importing States at large from 1915 to 1918, yield results similar to that of 1919. (Rec., 1103-1112; 1736, insert pages, 440-447). It suffices to refer to 1918.

In Pennsylvania (Rec., 1103, 1104), the entire consumption was 177,139,804 M cubic feet; domestic consumption, 59,839,730 M or 32.72%; and industrial consumption, 117,300,074 M or 66.28%. The amount transported into the State was 53,326,446 M, or 30.11% of the whole; produced in the State, 123,813,358 M, or 69.89%. The industrial consumption in Pennsylvania (exclusive of gas for field purposes) was 73.74% of the Pennsylvania production, and almost 15,000,000 M in excess of the 52,985,173 M supplied to West Virginia by all public service corporations.

In Ohio (Rec., 1105, 1106), the entire consumption was 143,585,260 M cubic feet; domestic consumption, 98,023,666 M, or 68.27%; and industrial consumption, 45,561,595 M, or 31.73%. The amount transported into the State was 82,324,191 M, or 57.34% of the whole; produced in the State, 61,261,069 M, or 42.66%. The industrial consumption (exclusive of field gas) was 34.81% of the Ohio production.

In Indiana (including, however, Chicago, Illinois), the entire consumption was 4,516,585 M cubic feet; domestic consumption, 2,428,003 M, or 53.76%; and industrial, 2,088,580 M, or 46.24%. The amount transported into the State was 2,849,761 M, or 63.10% of the whole; produced in the State, 1,666,822 M, or 36.90%. The industrial consumption (exclusive of field gas) was 48.23% of the Indiana production. (Rec., 1108, 1109).

In Kentucky (Rec., 1110-1112), the entire consumption was 12,200,190 M cubic feet; domestic consumption, 7,922,941 M, or 64.94%; and industrial consumption, 4,277,249 M, or 35.06%. The amount transported into the State was 9,177,751 M, or 75.23% of the whole; produced in the State, 3,022,439 M, or 24.77%. The industrial consumption (exclusive of field gas) was 104.33% of the Kentucky production.

The statistics for earlier years (Rec., 1103-1112; 1736, insert pages 440-447) indicate still higher proportions of industrial consumption by the four States.

For comparison we add West Virginia (Rec. 1092-1097): Based on figures of the United States Geological Survey (which vary from the figures of the statistician of the Public Service Commission heretofore given), the entire consumption for all purposes was 107,587,945 M cubic feet; domestic consumption 20,399,-914 M, or 18.91%; industrial consumption 87,248,031 M, or 81.09%. Based on the same figures, the total production of West Virginia in 1918 was 265,160,917 M (Rec. 1093); and the industrial consumption (includ-

ing carbon-black, but excluding field gas) was 23.52% of the West Virginia production.

We do not overlook that much of the industrial consumption above occurs in the summer months, when domestic use is diminished. Rec., 289, 350). We recognize, also, the concurring statements of the officials of the principal gas companies that the industrial consumption is "the life of the business" (Rec., 698, 151, 289, 327, 328), and that its discontinuance would necessitate greatly increased domestic rates (Rec., 151, 289, 290, 526). But we think that the character of this consumption, and the application of the production of the other States, become highly material, when those States, making no attempt to restrict their own use of gas (*Walls vs. Midland Carbon Co.*, 254 U. S., 300; *Ohio Oil Co. vs. Indiana,* 177 U. S., 190), appeal to this Court in the name of their domestic consumers, and rail at the industrial consumption of West Virginia.

LOCAL COMPANIES—SERVICE AND SUPPLY.

We have referred to the shortage of gas in West Virginia, resulting from the control of the seven companies and the transportation of gas to other States. Recurrence must be had to the situation of the local companies.

The seven transporting companies supply gas by direct service to forty-nine municipalities, with an aggregate population of 199,469 (Rec., 1011, 1012). Other cities and towns formerly served by local companies, whose properties were acquired by the seven companies, or one of them, have been abandoned by the latter.

In some of the oldest and richest gas counties, where one or more of the seven companies hold ample supplies and facilities, they furnish either substantially no gas or none at all by direct service.*

Clarksburg, Fairmont, Huntington, Morgantown, Weston, Buckhannon, Shinnston, Lumberport, Weston, Glenville, South Charleston, St. Albans, and other cities and towns, are supplied in whole or in part by local companies. (Rec., 842, 1026, 1034-1036, 1039, 1041, 1203, 1220).

The local companies operated contemporaneously with the development and expansion of the seven companies, produced from the same pools, and transported and marketed to consumers in the same West Virginia territory in which the seven companies produced and marketed; and in some instances the same community was partially served by both. In the earlier years the volume of the wells was large, the rock pressure great, and the gas easily marketed through its own native force; and, having an abundant supply and no present

*In Harrison County, with an area of 266,240 acres, in 1919, five of the seven companies owned and operated an aggregate of 171,996 acres of territory 1,674 wells, and 1,157 miles of pipe line and bought the gas of 161 wells from 57 independent producers. These five companies served not more than 900 domestic consumers and no industries in that county although their pipe-line systems, gas territory and production surrounded, and in some cases extended into, the cities of Clarksburg and Salem, Shinnston and other municipalities, which have been without an adequate supply of gas since 1916. In Lewis County, having an area of 251,520 acres, in the same year, four of the seven companies owned and operated an aggregate of 176,739 acres, of territory, 1,106 wells, and 795 miles of pipe line and bought the gas from 66 wells owned by 16 independent producers. These four companies sell gas to no industries and no local utilities, nor serve any incorporated cities or towns in that county, their service being limited to approximately 1,200 consumers in rural communities, chiefly lessors receiving free gas as rental (Rec., 1026-1028).

or prospective market other than the particular communities then served, these smaller companies in most cases acquired and held only a limited territory, close to the place of consumption, and acquired little or no reserve territory (Rec., 38, 136, 212-213, 1001-1003, 1020, 1021, 1568). While the opportunity to obtain reserve acreage was open to them equally with the seven companies, before and at the time when the latter began their activities in this direction, yet it was neither wise nor financially possible to acquire extensive territory. To have developed additional acreage for which they had no market, would have defeated the very object of a reserve; and to hold such acreage in reserve until an additional supply was needed rendered it probable that the gas would be drained away through the operations of the seven companies in surrounding territory. And when later they required additional gas by reason of the decline of the supply from their own wells or the growth of the communities served, the smaller companies found not only that substantially all available territory had been acquired by the seven companies, but also that such occasional and isolated tracts of gas territory as could be secured were worthless; for the cost of pipe lines to reach these scattered parcels was beyond their financial resources and out of proportion to the value of the project, and the enormous quantities of gas theretofore extracted from the pool by the seven companies had reduced the rock pressure of all wells in the field to the point where compressor stations were necessary adjuncts to transmission of the gas through the lines. In like manner the local companies were unable to reach out into the field to secure the production of the independent producers, for the

amount of such production not held under contracts of sale to the seven companies were small and scattered and entailed the like disproportionate and prohibitive cost of lines and compressor stations (Rec., 1254, 1256. 1269, 1270, 1272, 1278, 1279, 1290, 1291, 1308, 1312, 1330, 1334, 1338, 1361-1362).

PREVIOUS SUPPLY TO LOCAL COMPANIES BY THE SEVEN COMPANIES.

Until the gas shortage of 1916-1917, the lack of reserve territory by the local companies and the diminishing volume of the gas occasioned no practical difficulty in West Virginia; for, notwithstanding the export business of the seven companies and the contracts under which that business was carried on, the local companies, whose own stocks of gas became insufficient, were able to, and did, make up the deficiency by purchases from one or more of the seven companies. (Rec., 1034-1036, 1724, 1728; 1736, at insert pp. 402, 414, 280, 297, 314, 345, 349). The quantities so purchased were readily and easily furnished, since the seven companies were possessed of an ample surplus, and one or more of their trunk lines lay within the immediate vicinity of, or traversed, the areas of service of the smaller companies, and often served consumers in the same community or territory (Rec., 275-277, 1011, 1012, 1037). It was thus a mere matter of connecting the lines of the two companies and discharging gas from the one to the other. Sales by the seven companies to local companies were thus customarily affected for some years prior to the commencement of the shortages to West Virginia

consumers in 1916-1917. The Hope Natural Gas Company was connected with and supplied deficiencies of the several local companies serving Fairmont, Clarksburg, Weston, Pennsboro and elsewhere (Rec., 186, 210, 237, 238, 1035, 1209, 1210). The Carnegie Natural Gas Company was connected with and supplied the several local companies serving Fairmont and Morgantown (Rec., 1034, 1912, 1220). The Pittsburgh & West Virginia Gas Company was connected with and supplied the deficiency of the local companies serving Fairmont and Glenville (Rec., 1034). The United Fuel Gas Company was connected with and supplied the deficiency of the local company serving Dunbar, South Charleston and St. Albans (Rec., 395, 400, 1036).

Many of these sales yet continue during the milder periods of the year, but since the demands in other States have equalled or exceeded the supply, the seven companies have asserted priority of their sales contracts and their obligations to the consumers abroad, and have declined and refused to sell to the local companies during the winter periods, when the requirements of the domestic consumers are greatest, both in amount and necessity (Rec., 276, 277, 1209, 1210, 1230, 1231, 1724, 1728). This refusal has been one of the chief causes of the suffering, inconvenience and losses by West Virginia consumers.

As a result of the foregoing the local companies and the consumers supplied by them are dependent upon the seven companies for a part of their supply. As the production of the local companies decreases, this dependency will necessarily become greater. And if and when the seven companies resort to the process

of suction (to which the compressor stations are readily applicable) to increase the output of their West Virginia wells, the wells and territory of the local companies will be so far depleted as to render their dependence substantially complete (Rec., 1279, 1310-1312). This suction is now a common practice in Pennsylvania, has already begun in West Virginia, and eventually will be resorted to by all the companies (Rec., 345, 346, 1311, 1312). This, of course, means the suction of gas from the entire territory surrounding the pump station, and that no well therein will be capable of producing except by the employment of the like suction or other artificial means of extracting the gas; and, as a necessary result, all local companies dependent upon natural pressure to market and distribute their supply will be effectually driven out of business unless supplied by the seven companies.

PRESENT AND FUTURE GAS SUPPLY.

It is uncontroverted that the gas fields in Ohio, Pennsylvania and Indiana are either exhausted or in progressive process of exhaustion; and that the West Virginia production has passed its peak and for several years has declined rapidly; that no other gas fields are known or in prospect in Ohio, Pennsylvania, West Virginia or neighboring States; that the aggregate production is insufficient to meet the requirements of the consumers in all the States; and that the shortage will increase. (Rec. 132, 210, 296, 327, 328, 335, 431, 458, 459, 558, 701, 702). One of the witnesses for the plaintiffs quotes Dr. I. C. White, a leading authority, to the effect that seventy-five per cent. of the West Vir-

ginia and Ohio gas is gone. (Rec. 607). This witness refers to gas as "a vanishing product." (Rec. 698). He says, "We are approaching the end;" that the termination of the gas business will come "ultimately, just as we know every man will die some time." (Rec. 702, 703).

As already pointed out it was from the very beginning of the use of West Virginia gas by the people of the plaintiff States, inevitable that the production of the West Virginia fields would decline and the gas supply therefrom become insufficient for all consumers. The day came in the winter of 1916-1917. It is now admitted by the seven companies, and by the companies purchasing from them, that their present supplies of gas, including the production in the other States, have been for several years insufficient in winter periods to furnish fuel for the heating of dwellings or otherwise to supply their consumers in Ohio, Pennsylvania, Kentucky and Indiana; and that their ability to serve such consumers has become less and less with each succeeding year. Hence, taking as true the testimony for the plaintiffs, the predicted lack of sufficient West Virginia gas to heat the dwellings and otherwise serve these consumers in the plaintiff States, so elaborately and gloomily charged in the bills of complaint as the necessary result of enforcing the statute in controversy, has already come to pass, has existed for several years, and this lack will certainly increase in the future. This has resulted, and will result, by the process of nature, and not as an effect of the statute, which has never been put into force.

At Columbus, Ohio, there is already a shortage of fifty per cent. in the winter (Rec. 635). A shortage

of twenty-five per cent. on the lines of the Ohio Fuel Supply Company in the winter of 1920-1921, was predicted in testimony given in 1920. (Rec. 697, 698). At Cleveland, served by the East Ohio Gas Company, there was a shortage of over 50,000,000 feet a day in the winter of 1918-1919 (Rec. 577).

The vice-president of the Hope Natural Gas Company fixes the maximum life of the present gas supply at ten or fifteen years (Rec. 349). The president of The Philadelphia Company states that at the present rate of consumption he will be very much surprised if it lasts ten years (Rec. 507). The record contains other estimates of similar character, with some variation in estimated periods (Rec. 481, 943).

The seven companies have an aggregate territory in West Virginia, which, since the year 1910, at all times has exceeded 2,400,000 acres with only 689,205 acres thereof developed up to 1920 (Rec. 1736, insert p. 391). The required quantity of gas for all consumers probably could be provided by the drilling of additional wells. In 1919, the last year for which statistics are available, the seven companies drilled fewer wells than during any other year in the ten years covered by the statistical table (Rec. 1023); and there was a marked decrease in the number drilled in 1918 as compared with those drilled in 1917. The United Fuel Gas Company, holding the second largest acreage and the least developed territory of the seven companies in 1919, drilled only 15½ producing gas wells and abandoned the same number (Rec. 1736; insert p. 313). A managing officer of the Hope Natural Gas Company and Reserve Gas Company frankly recognizes that the required sup-

ply could be had if enough wells were drilled, and that it is merely a question of whether the residuum of gas in the West Virginia fields is to be produced and utilized over a shorter or longer period. He says, "It is just up to the people what they are going to do with it;" that the companies "can use it up in two or three years," or "can extend it over a period of ten or fifteen years." (Rec. 349). If development is to proceed as before, in the known fields and sands, and the rate of well drilling is to go on as previously, so that the natural decline will be overcome, the exhaustion of the West Virginia gas will only be hastened.

There remain, aside from the complete development of the presently commercial sands by the customary methods of drilling and operation, the tenuous hope (Rec. 713), none too confidently expressed, that additional paying gas sands may be discovered by the highly expensive and yet unsuccessful drilling of deeper wells (Rec. 135, 325, 433, 435); and the application of suction to the wells in the known sands, which process will but hasten the depletion of the sands and the exhaustion of the gas (Rec. 345, 346, 1311, 1312).

Remedies for Gas Shortage.

What is a reasonably adequate supply of gas to the individual consumer is better expressed by description than by definition.

The consumption of gas has its distinguishing characteristics. Its supply has been aptly described in the record as the rendition of a service rather than the delivery of a commodity (Rec. 1434. 1435, 1652). For cooking, hot water heating and the heating of dwelling-

houses, stores, office buildings, churches, schools and other public and private buildings, as well as for the conduct of industries, gas is valuable according to its constant availability and adequacy. No reserve can be stored on the consumers' premises, as with coal, oil or wood. When needed it is needed immediately and the cost of equipping the premises for the occasional use of other fuel is as great as for a complete change. An intermittent service is undesirable, and unless the service of gas can be made constant and dependable, the value of its use is substantially destroyed. Continuity and dependableness of supply are essential, especially to domestic service. (Rec. 48, 214, 674, 675, 677, 525). This feature, admitted throughout the testimony, is well expressed by Judge Reed, president of The Philadelphia Company, in testifying as to the practicability of apportioning an inadequate supply. He says (Rec. 525):

"A. * * * You can't satisfy a man by giving him 50 per cent. of his requirements. His wife can't cook with it, and his house is cold. He either wants all or nothing.

Q. * * * The fact is, that to properly supply a thousand consumers is better than to improperly supply 2,000; is that the fact?

A. That is the fact; yes, sir."

To the same effect is the testimony of the witness Wyer (Rec. 1437, 1668), who says "that usable service to a limited number is better than poor or no service to a large number," and recognizes this feature to be one of "the inherent characteristics and natural limitations of the natural gas industry."

This being the character of gas consumption and service, if the volume is insufficient for all, it is obvious that a remedy devised and enforced by someone is essential, and that if man does not voluntarily provide the remedy nature will compel it. The manifest course, in view of what has been said, is the limitation of consumption either in respect of the purpose of use or by restriction of the area of service. And it appears that ultimately the restriction of area of service must come, even in the absence of the statute. The witnesses for the plaintiffs admit that in any event, in time of shortage, the shortage is first and most severely felt at the points farthest from the sources of supply, and that consumers nearest those sources obtain relatively the better service. (Rec. 392, 393, 1436). It is also admitted that service to remote consumers is more costly and subject to losses by leakage in transportation. The contracts already referred to show that the gas companies themselves have theoretically recognized the paramount claims of the domestic consumers of West Virginia. (And see Rec. 50, 51).

But without anticipating the argument, our present purpose is to point out that though the seven companies oppose the legislative remedy, they and their officers are in the main wedded to the doctrine of *laissez faire*, with the corollary of uncontrolled discretion of themselves. And, where in cross-examination these specialists have been driven to suggest a remedy, they are at sea and disagree among themselves, agreeing only that West Virginia consumers are getting too great a share of West Virginia gas. Certain of them advocate restriction of the use to cooking and hot water heating for domestic purposes (Corrin, 348); others sug-

gest limiting the quantity allowed to each consumer (Tonkin, 441-3); others are positive the real remedy lies in increasing the price to the point where the consumer will himself cut down the amount used (Daly, 608; Freeman, 475-477); others say that eventually the number of consumers must be decreased and the area of service contracted toward the source of supply (Quay, 134, 163-9; Denning, 698, 703, 704; McMahon, 732; Whitcomb, 805; Anderson, 855, 856). One suggests that the constantly increasing inadequacy of service will eventually remedy itself by driving many consumers to the use of other fuel, leaving the small volume of gas to fewer and more persistent customers (Rec. 134). Some of the officials of gas companies frankly confess that they do not know what can be done (Judge Reed, 525; Sullivan, 297).

All of these witnesses, officers of gas companies, declare necessary the use of gas for industrial purposes whenever there is a surplus over the needs of the domestic consumers, and state that the industrial consumption is financially necessary to the gas company and aids to keep down domestic rates (Rec. 288, 328, 437, 476, 525-526). One witness for the plaintiffs (Wyer, 942), advocates the complete elimination of gas for industrial use and the limitation of the classes of domestic use, as a matter of conservation, and eventually the cutting off of consumers in the remote areas of service. This, he says, will diminish the volume transported from West Virginia to other States. (Rec. 942, 943, 967, 968).

The enrichment of natural gas with artificial gas has been suggested, with ultimate resort to artificial

gas alone. (Rec. 803). But it is stated that the combination of artificial with natural gas has not yet been successful. (Rec. 506, 507). The substitution of artificial gas in the pipe-line systems is still in an experimental stage. (Rec. 428).

Since, then, the major portion of the gas used by consumers in the plaintiff States comes from West Virginia through its public service corporations, the necessary result of each of these suggestions, except that of contraction of area of service, is the same; that the adjustments of West Virginia consumers must be made, and their uses of gas must be regulated and restricted, according to the requirements of the consumers in Ohio, Pennsylvania, Indiana and Kentucky, and without regard to the character or extent of the public service undertaken by these corporations in West Virginia and their duties to that State.

The reasonable anticipation, if regulation were to be left to the gas companies, is accurately gauged by the denial of the plaintiffs of West Virginia's regulatory power, if and when its regulations affect the quantity of gas transported to the other States, regardless of consequences in and to West Virginia; by the predictions of injury to the other States and gas companies operating therein, by the withdrawal of any West Virginia gas from export (Rec. 222, 447, 526, 587, 605, 606, 673, 729, 854, 972, 973); by the insistence by an officer of one of Ohio gas companies on his company's peak load requirement in time of shortage (Rec. 697); and by the thought expressed by some witnesses for the plaintiffs, exemplified by Anderson, another engineer of these companies, that, irrespective of the

statute, any increased consumption in West Virginia, even because of increased population, would prejudice the other States (Rec. 854):

"Q. Would any increase of consumption in West Virginia have the result of depriving Pennsylvania and Ohio consumers?

A. It would have the result of depriving them to that extent, I think.

Q. That is, for every 1,000 feet of added consumption in West Virginia, consumers in Pennsylvania and Ohio will be deprived to that extent?

A. I think so.

Q. And to the extent that the gas companies are prevented from furnishing that 1,000 feet in Pennsylvania or Ohio, those companies will suffer a loss in their plants, or the operation of their plants?

A. And profits.

Q. I want to ask you whether the inconvenience in Pennsylvania and Ohio, resulting from the consumption of this extra 1,000 cubic feet of gas in West Virginia, would occur, whether that extra consumption were brought about by the enforcement of this statute, or brought about by additional consumers, or some other cause?

A. It would occur in the same way and to the same extent.

Q. In other words, if some citizen of New York or New Jersey should move to Clarksburg, West Virginia, and add to the population that way, and consume gas for domestic purposes, some Pennsylvania or Ohio consumer, or the consumers in those States in the aggregate,

would be deprived and inconvenienced to that extent?

A. Providing he was located on the lines of some of these interstate companies.

Q. That is what I mean.

A. Where he could obtain some of their supply, or possible supply."

And see, in similar strain, the testimony of Wyer (Rec. 972, 973):

"Q. It is, however, your idea, regardless of the class of consumption that, to the extent of the increase of every thousand feet of consumption in West Virginia, there would be a corresponding diminution of supply in the other States?

A. If the act in question were enforced, there would be no supply in the other States coming from West Virginia.

Q. Suppose we forget about the act and answer the question in the light of the fact that you have declared it unconstitutional?

* * * * * * *

Q. Putting the thing in this way: Suppose that for some unknown reason a resident and citizen of Massachusetts moves to Clarksburg, West Virginia, with his family, and by reason of the added population, theoretically assumed to be five, you have one more gas consumer and a matter of consumption of 5,000 cubic feet of gas a month. Would the effect of that added 5,000 cubic feet of consumption be to diminish the supply in Pennsylvania and Ohio and that regardless of this statute?

A. It would not affect the supply in Pennsyl-

vania or Ohio, but it would reduce the amount of gas that could be transported out of the State by the amount that would be used in West Virginia. * * *

Q. Put it at 1,000 instead of 5,000. There would be in principle and in effect a corresponding diminution and increase?

A. Yes, an increased demand which must, of course, be met from the local gas supply. I think you misunderstood my former answer. The thing I wanted to drive home was that the consumption per domestic consumer would not be very greatly increased unless there were a very radical reduction in prices from the condition you have now.

Q. You would expect to cut down the domestic consumption by raising the price?

A. A raise in price will cut it down. The increased price is the only thing that will adequately conserve natural gas."

Effect of the Statute.

Many predictions are made by witnesses for the plaintiffs as to the injurious effect on the gas supply of the other States, if the statute here involved, is enforced. These, of course, are "mere prophesies which are ventured" (*Tanner vs. Little*, 240 U. S., 369, 385). The statute has not been tested in operation. "The fact must be tested by the actual transaction" (*Western Union T. Co. vs. Speight*, 254 U. S., 17).

Some of the witnesses for the plaintiffs admitted that a reasonably adequate supply of gas for domestic

use in West Virginia would permit "a fairly adequate service" in Pennsylvania and Ohio, "a reasonably adequate service" to domestic consumers along the lines of their companies in the other States (Rec. 145, 146, 406, 407).

The stress of the contention of the plaintiffs is directed to West Virginia industrial consumption, and to the carbon-black industry. The facts concerning the relatively small and uninfluential carbon-black business are referred to in the margin.*

**Gas Used by Carbon Companies.*—Carbon-black manufacturing companies in West Virginia consumed in 1919 approximately nine per cent. of the production of the State. An engineer for some of the seven companies, testifying for the plaintiffs, argues the alleged wastefulness of this use of gas, and points out that the quantities so used would provide the deficiency in supply of West Virginia consumers. It is shown by West Virginia that gas for carbon making has never been a customary or public use of gas; that no tariff or provision therefor has been made by the Public Service Commission, and that no public service corporation uses or serves gas for such purpose, except the United Fuel Gas Company, which operates a carbon plant for the utilization of isolated, low-pressure gas (Rec., 991-993, 1060, 1061, 1075). A like plant is operated by the South Penn Oil Company, an oil subsidiary of the Standard Oil Company owning the Hope Natural Gas Company, to which the South Penn markets most of its gas.

In addition to the private character of these carbon companies and their gas supply, their product can only be made from natural gas, and is an essential element of important manufactured products (Rec., 1100, 1101, 1130, 1131, 1137). Generally their gas territory and production are located at remote points. They are rapidly going out of business because of the increase in value of the gas for other purposes (Rec., 993, 1040, 1060, 1098, 1151, 1137, 1327, 1349). And since the lines of the seven companies afford practically the only market therefor, the gas of the carbon companies now marketed does not materially aid West Virginia consumers; nor would the entire diversion thereof from carbon-black add appreciably to the supply of West Virginia consumers (Rec., 1349). Aside from the questionable right of the plaintiff States to dictate the employment of West Virginia gas, compare the practically exclusive use by Carnegie Natural Gas Company of its supply from both West Virginia and Pennsylvania fields for steel making, in which other fuel is readily usable; the amount of West Virginia gas so used by this one company averaging three-fourth of the annual quantity used for carbon-black in West Virginia during the last decade (Rec., 925, 926, 992; also W. Va. Exhibit No. 19, Rec., 1736, insert pp. 414-423).

In the light of what has already been said, and the concurring views of the officials of the seven companies, already referred to, that the industrial use is advantageous both to the companies and the domestic consumers, and that gas always has been, and is still used in large volumes in the plaintiff States and elsewhere, no special reference to the past use seems requisite.

As to the present it is to be observed that many of the factories in West Virginia have already been altered so as to consume coal and produce gas artificially manufactured from coal (Rec., 1229, 1230, 1345), thus reducing the industrial gas requirements of the State.

In respect of the future, the high price of natural gas, constantly rising, prevents profitable competition with producer gas, except in the few processes to which natural gas is more especially adapted (Rec., 1226-1227, 1230, 1345, 1346, 509), and when once an industry has installed producer gas, even a temporary seasonal supply of natural gas—as in the summer—would not compensate for the disorganization consequent on the change from producer to natural gas (Rec., 1228).

Testimony was given on behalf of the plaintiffs to the effect that the enforcement of the statute would absorb for West Virginia its entire gas production. This, as already said, lies in assertion and prophecy, based largely on speculation and hearsay, coupled with the erroneous assumption that the statute compels not reasonably adequate service to the particular consumers and distributing companies in specified territory,

but that the whole production of the State is to be pooled and all consumers are to receive all the gas they may choose to demand (Rec., 123, 300-302, 446, 840, 841, 970, 971). These general forecasts, of course, also leave out of view the circumstances already detailed, diminishing the probable industrial consumption in West Virginia and the jurisdiction of the Public Service Commission to limit consumption to reasonable adequacy, as well as to compel reasonably adequate service.

The character of the plaintiffs' evidence on the point may be summarized by reference to the testimony of their witness Anderson, an engineer employed by several of the seven companies, who supplies alternative estimates of increased industrial consumption in West Virginia, in case of the enforcement of the statute, as follows: on one theory, 98,628,380 M cubic feet; on another, 55,017,359 M cubic feet; on another, 38,468,334 M cubic feet, and on still another, 32,959,471 M cubic feet (Rec., 824, 825, 836-839).

The fallacy of Anderson's figures, as well as the speculative general forecasts of other witnesses seems sufficiently to appear from the fact that in the year of its largest consumption, the whole consumption of gas available for public service, was only 59,409,460 M cubic feet out of a total supply of 259,414,200 M cubic feet in the hands of the public service companies (Rec., 996). Witnesses for West Virginia testify, and the industrial conditions already stated are persuasive, that even this 1916 consumption will, insofar as the industrial element is concerned, be greatly reduced (Rec., 1345-1346).

CONTENTIONS OF WEST VIRGINIA.

It is the contention of West Virginia:

1. That these cases present no controversy between States, but are in reality controversies between West Virginia and its public-service gas companies, in attempted vindication of whose alleged rights the plaintiffs have become nominal suitors.

2. That these suits are premature, since at the time of their commencement the statute in controversy had not been tested in practice; and there was no threatened injury of serious magnitude, clearly or convincingly proved or susceptible of such proof.

3. That the West Virginia gas companies, and especially the seven companies controlling the West Virginia gas supply and transporting the major part of the gas to or for consumption in other States, while a shortage exists in West Virginia, are West Virginia public service corporations, owing their existence and their ability to transport gas to other States to the special rights and privileges granted by West Virginia upon the condition that a reasonable adequate service would be rendered to West Virginia consumers.

4. That the business of the gas companies and their gas, in the existing condition of shortage, are affected with the public interest of West Virginia.

5. That the duty to render a reasonably adequate service to West Virginia consumers extends alike to domestic users, public buildings and institutions and industrial users.

6. That under the conditions of existence of the gas companies, both implied and expressly reserved, and in the exercise of the police power, it was within

the province of West Virginia to enact the statute in contest, and that the statute was and is necessary and reasonable in its provisions.

7. That the requirement of reasonable adequacy of service to industrial consumers, and the clauses requiring in certain circumstances (and under the safeguards of a hearing and determination before the Public Service Commission, with opportunity for judicial review) the furnishing of gas deficits to local companies, were and are justified and proper.

8. That the gas companies cannot by engagement in interstate commerce, or the desire so to do, evade or abandon their duty to render reasonably adequate service in West Virginia, and that if interstate commerce is engaged in by them, it is and must be in subordination of their duty to West Virginia and the regulating power of that State.

9. That interstate commerce is not regulated, nor was it intended so to be; that any effect on such commerce would be only indirect and incidental.

10. That the statute does not infringe upon any guaranty of the Federal Constitution.

11. And that the plaintiffs have no just ground for complaint against West Virginia and have established no case against it.

Argument.

I.

THE BILL IN EITHER CASE DOES NOT PRESENT A CAUSE JUSTICIABLE BETWEEN THE TWO STATES PARTIES TO THE ACTION.

In the motions to dismiss contained in the answers we have assigned, among other grounds, that these cases present no controversy between States within the meaning of Article 3, Section 2, of the Constitution. The general trend of the evidence has fortified in fact the objection in law. The jurisdictional objection is emphasized by the fact, not to be blinked, that while sovereign States have sued, these cases are controversies between West Virginia and certain gas companies. Respecting the plaintiff States and their dignity, West Virginia shrinks from impugnment of their motives. But without intimating any unworthy design, we have no alternative except to question the jurisdiction—the preliminary question in every case. And, indeed, in *Kansas vs. United States,* 204 U. S., 331, this Court said:

> "In these circumstances we think it apparent that the name of the State is being used simply for the prosecution in this Court of the claim of the railroad company, and our original jurisdiction cannot be maintained."

The substantial ground upon which the plaintiffs sue is the individual grievances of their citizens sought

to be redressed by the plaintiffs in their character of *parens patriae.*

The statute complained of is local in character and applies to gas produced within West Virginia, while yet within its borders and in the hands of its public service corporations. The plaintiffs have no ownership of, or property interest in, the gas in its original character as a natural resource of West Virginia, or at any time thereafter during the successive stages of production, transportation or marketing thereof to the ultimate consumer. Neither does the statute in anywise affect, modify or trench upon any governmental or corporate power of the plaintiffs; nor does its operation impair the integrity of, or exert any force upon, or prejudicially affect any land, stream or other property within the territorial jurisdiction of the plaintiffs. The thing most clamorously complained of is the assumed interference with the export of the gas in interstate commerce, and the consequential interference with the ultimate delivery thereof to citizens of Ohio and Pennsylvania. Subsidiary and trifling in comparison are the complaints of shortage of gas in municipalities and public institutions,—a matter aptly characterized in the language of Mr. Justice Holmes in *Georgia vs. Tennessee Copper Co.*, 206 U. S., 230, 237, as "merely a make-weight." A further grievance sought to be appropriated by the plaintiffs as their own, is the alleged injury to the companies and persons engaged in West Virginia gas operations, the property and business of which, it is predicted, will be prejudiced by the enforcement of the statute.

The mere fact that States are named as parties does not conclude the question of jurisdiction, or characterize a cause as justiciable between States.

Kentucky vs. Dennison, 24 How., 66;
New Hampshire vs. Louisiana, 108 U. S., 76, 89;
New York vs. Louisiana, 108 U. S., 76, 89;
Wisconsin vs. Pelican Ins. Co., 127 U. S., 265, 287;
Missouri vs. Illinois, 180 U. S., 208, 239;
Kansas vs. United States, 204 U. S., 331, 341;
Oklahoma vs. Atchison, T. & S. F. R. Co., 220 U. S. 277, 289;
Oklahoma vs. Gulf, C. & S. F. R. Co., 220 U. S. 290. 298.

Whether a suit is against a State, in the constitutional sense, is a matter of substance and effect, not to be determined by the names of the parties.

Louisiana vs. Jumel, 107 U. S., 711, 726;
Hagood vs. Southern, 117 U. S., 52, 69;
Minnesota vs. Hitchcock, 185 U. S., 373, 387;
Murray vs. Wilson Distilling Co., 213 U. S., 151, 158;
Louisiana vs. McAdoo, 234 U. S., 627, 629, 632.

In *New Hampshire vs. Louisiana,* and *New York vs. Louisiana, supra,* it was considered that as the plaintiffs had no interest in the bonds sued on, they were mere nominal parties, and that no controversy between States was involved.

As remarked by Mr. Justice Gray in *Wisconsin vs. Pelican Ins. Co., supra*:

"Yet notwithstanding the comprehensive

words of the Constitution, the mere fact that a State is the plaintiff is not a conclusive test that the controversy is one in which this Court is authorized to grant relief against another State or her citizens."

Conceding that no hard and fast line has yet been drawn delimiting the justiciable and the non-justiciable between States (*Missouri vs. Illinois*, 180 U. S., 208, 241), we think that a brief survey of the cases and the mode of their disposition (*Wisconsin vs. Pelican Ins. Co.*, 127 U. S., 265, 287, 297) readily marks the present litigation as falling within the latter category. It is not the "subject of judicial cognizance" (*Hans vs. Louisiana*, 134 U. S., 1, 15; *Louisiana vs. Texas*, 176 U. S., 1, 15; *Missouri vs. Illinois*, 180 U. S., 208, 233) or "susceptible of judicial solution" (*Louisiana vs. Texas*, 176 U. S., 1, 18, 22; *Missouri vs. Illinois*, 180 U. S., 208, 233, 234).

Of the cases of which this Court has taken original jurisdiction the most numerous have been those relating to the boundaries or territorial integrity.

Virginia vs. West Virginia, 11 Wall., 39;
Wisconsin vs. Pelican Ins. Co., 127 U. S., 265, 288;
Louisiana vs. Mississippi, 202 U. S., 1, 35, 36;
Virginia vs. West Virginia, 246 U. S., 565, 591, note.

In another class of cases jurisdiction was exercised because of a nuisance by the invasion of the plaintiff States by sewerage or disease germs polluting their waters and soil, to the injury, actual or threatened, of the

lives, health and property of the citizens of those States. Examples are *Missouri vs. Illinois,* 180 U. S., 208, 200 U. S., 496; and *New York vs. New Jersey,* U. S., Adv. Ops., 1920-21, p. 544. Falling within the same category is *Georgia vs. Tennessee Copper Co.,* 206 U. S., 230, 237, in which it was remarked by Mr. Justice Holmes that in the capacity of quasi-sovereign:

> "A state has an interest independent of and behind the titles of its citizens in all the earth and air within its domains."

These nuisance cases are identical in principle with the boundary cases. The sovereign rights and territorial integrity of a State may be as effectually invaded or infringed by the casting or precipitation thereon of intangible, but nevertheless noxious, bacteria or gases as by visible seizure of its lands. In *Kansas vs. Colorado,* 206 U. S., 46, 97, the case of *Missouri vs. Illinois* was referred to by Mr. Justice Brewer as one in which "the action of one State reaches, through the agency of natural laws, into the territory of another State."

Kansas vs. Colorado, 185 U. S., 125, 206 U. S., 46, in which jurisdiction was sustained, was similar in aspect. Not only was the territorial integrity of Kansas affected by Colorado's diversion of the waters of the Arkansas River, which in the course of nature would have flowed into Kansas; but also Kansas claimed to be injured in its capacity as the owner of a "large tract of land bordering on the Arkansas River." (206 U. S., 99).

In *Pennsylvania vs. Wheeling & B. Bridge Co.,* 13 How., 518, the suit was treated "as brought to protect

the property of the State of Pennsylvania." (*Wisconsin vs. Pelican Ins. Co.,* 127 U. S., 265, 296). Mr. Justice McLean said, at pages 559 and 561:

> "The State of Pennsylvania is not a party in virtue of its sovereignty. It does not come here to protect the rights of its citizens. The sovereign powers of a State are adequate to the protection of its citizens and no other jurisdiction can be exercised over them, or in their behalf, except in a few specified cases. Nor can the State prosecute this suit, on the ground of any remote or contingent interest in itself. It assumes and claims, not an abstract right, but a direct interest in the controversy. * * * It asks from the Court a protection of its property, on the same ground and to the same extent that a corporation or individual may ask it."

Another class of cases has been those of contract,—of indebtedness from one State to another, or to the creditors of the latter, from the debts to whom the plaintiff was entitled to exoneration at the hands of the defendant.

South Dakota vs. North Carolina, 192 U. S., 286;
Virginia vs. West Virginia, 206 U. S., 290; 220 U. S., 1, 26-28; 238 U. S., 202, 208;
United States vs. North Carolina, 136 U. S., 211;
United States vs. Michigan, 190 U. S., 379.

Comparison of *South Dakota vs. North Carolina* and *Virginia vs. West Virginia* with *New Hampshire*

vs. Louisiana, supra, indicates that jurisdiction in the former cases was predicated upon the property rights in the plaintiff States or the protection of their corporate credit.

In all of the foregoing cases in which jurisdiction was upheld, the object was to maintain the territorial integrity of the plaintiff (as in the boundary cases and in *Kansas vs. Colorado*), or to prevent the invasion of its territory (even though the invasion may have been by the intangible instrumentality of disease germs, as in *Missouri vs. Illinois* and *New York vs. New Jersey,* or a noxious gas, as in *Georgia vs. Tennessee Copper Co.*), or to recover the property or uphold the credit of the plaintiff (as in *South Dakota vs. North Carolina* and *Virginia vs. West Virginia*).

But neither in those cases nor elsewhere have we found an instance in which this Court has entertained original jurisdiction predicated solely upon the right of the plaintiff State as *parens patriae,* or as the representative of its citizens, to enforce their private grievances or to protect their private claims arising out of the enforcement of the law of another State, in the absence of a special or additional right of the character above indicated in the plaintiff State itself.

In *New Hampshire vs. Louisiana,* 108 U. S., 76, 89, 90, and the companion case of *New York vs. Louisiana,* it was strongly pressed that the plaintiffs might prosecute the suits "because, as the sovereign and trustee of its citizens, a State is 'clothed with the right and faculty of making an imperative demand upon another independent State for the payment of debts which it

owes to citizens of the former.' " But jurisdiction was denied on the ground that the plaintiffs had no interest in the bonds sought to be collected.

In *Louisiana vs. Texas,* 176 U. S., 1, the plaintiff sought to enjoin enforcement of quarantine laws of the defendant, because of their discrimination against and injurious effect on citizens of Louisiana engaged in commerce between the two States. In declining jurisdiction, Mr. Chief Justice Fuller said:

> "It is in this aspect that the bill before us is framed. Its gravamen is not a special and peculiar injury such as would sustain an action by a private person, but the State of Louisiana presents herself in the attitude of *parens patriae*, trustee, guardian, or representative of all her citizens.
>
> "She does this from the point of view that the State of Texas is intentionally absolutely interdicting interstate commerce as respects the State of Louisiana by means of unnecessary and unreasonable quarantine regulations. Inasmuch as the vindication of the freedom of interstate commerce is not committed to the State of Louisiana, and that State is not engaged in such commerce, the cause of action must be regarded, not as involving any infringement of the powers of the State of Louisiana, or any special injury to her property, but as asserting that the State is entitled to seek relief in this way because the matters complained of affect her citizens at large. Nevertheless, if the case stated is not one presenting a controversy between these States, the exercise of original jurisdiction by this Court as against the State of Texas cannot be maintained."

In a concurring opinion Mr. Justice Harlan said:

"But I am of opinion that the State of Louisiana, in its sovereign or corporate capacity, cannot bring any action in this Court on account of the matters set forth in its bill. The case involves no property interest of that State. Nor is Louisiana charged with any duty, nor has it any power, to regulate interstate commerce. Congress alone has authority in that respect. When the Constitution gave this Court jurisdiction of controversies between States, it did not thereby authorize a State to bring another State to the bar of this Court for the purpose of testing the constitutionality of local statutes or regulations that do not affect the property or the powers of the complaining State in its sovereign or corporate capacity, but which at most affect only the rights of individual citizens or corporations engaged in interstate commerce. The word 'controversies' in the clauses extending the judicial powers of the United States to controversies 'between two or more States' and to controversies 'between a State and citizen of another State,' and the word 'party' in the clause declaring that this Court shall have original jurisdiction of all cases 'in which a State shall be a party,' refer to controversies or cases that are justiciable as between the parties thereto, and not to controversies or cases that do not involve either the property or powers of the State which complains in its sovereign or corporate capacity that its people are injuriously affected in their rights by the legislature of another State. The citizens of the com-

> plaining State may, in proper cases, invoke judicial protection of their property or rights when assailed by the laws and authorities of another State; but their State cannot, even with their consent, make their case its case and compel the offending State and its authorities to appear as defendants in an action brought in this Court. If this be not so, we were wrong in *New Hampshire vs. Louisiana*, 108 U. S., 76, in which case it was held that one State could not, by taking charge of demands or debts held by its citizens against another State, acquire the right to bring a suit in its name in this Court against the debtor State."

The principle of *Louisiana vs. Texas* was still later applied in a case all the more forcible because it did not involve interstate commerce, *Oklahoma vs. Atchison, T. & S. F. R. Co.*, 220 U. S., 277. There Oklahoma sought to invoke the original jurisdiction in a suit to enjoin a foreign railroad company from charging more than specified rates on domestic shipments of lime, cement, plaster, brick, stone and crude and refined oil, in violation of an Act of Congress granting rights of way, passed while Oklahoma was a territory and the benefit of which statute the State claimed. In the bill it was alleged that these commodities were essential to the growth of the State; that the violation by the railroad company was a menace to the future of the State; and that if the railroad company was permitted further to operate the railroad in violation of the conditions of the grant contained in the Act of Congress it would be a hindrance to the growth of the State, as well as

an injury to the property rights of its inhabitants. In holding jurisdiction not to exist, Mr. Justice Harlan referred with approval to *Louisiana vs. Texas,* and said that if illegal rates were charged a controversy would exist between each shipper and the Company. He then says in the opinion:

> "But, plainly, the state, in its corporate capacity, would have no such interest in a controversy of that kind as would entitle it to vindicate and enforce the rights of a particular shipper or shippers, and, incidentally, of all shippers, by an original suit brought in its own name, in this court, to restrain the company from applying the Kansas rates, as such, to shippers generally in the local business of Oklahoma. * * * In the present case, the state seeks to enjoin the defendant company from charging more than the Kansas rates on the transportation of lime, cement, plaster, brick, stone, crude and refined oil. But the state, as such, in its governmental capacity, is not engaged in their sale or transportation, and has no property interest in such commodities. It seeks only, as between the railway company and shippers, by a general, comprehensive decree to enforce certain rates, and to compel the railway company to respect the rights of all of the people of Oklahoma who may have occasion to ship such commodities over the railway."

In the same opinion it is further said:

"These doctrines, we think, control this case, and require its dismissal as not being within the original jurisdiction of this court, as defined by

the Constitution. Under a contrary view that jurisdiction could be invoked by a state, bringing an original suit in this court against foreign corporations and citizens of other states, whenever the state thought such corporations and citizens of other states were acting in violation of its laws to the injury of its people generally or in the aggregate; although an inquiry in violation of law, to the property or rights of particular persons through the action of foreign corporations or citizens of states, could be reached, without the intervention of the state, by suits instituted by the persons directly or immediately injured.

We are of opinion that the words in the Constitution conferring original jurisdiction on this court in a suit 'in which a state shall be a party' are not to be interpreted as conferring such jurisdiction in every cause in which the state elects to make itself strictly a party plaintiff of record, and seeks not to protect its own property, but only to vindicate the wrongs of some of its people, or to enforce its own laws or public policy against wrongdoers generally."

A like conclusion was reached in *Oklahoma vs. Gulf C. & S. F. R. Co.*, 220 U. S., 290, 301, refusing jurisdiction of a suit to enjoin citizens of other States from violation of the prohibition laws of Oklahoma, it being held that the case was not "a suit to which a State shall be a party;" and that a State could not maintain a suit on its behalf, "where the primary purpose of the suit was to protect its citizens *generally* against the violation of its laws by the corporations or persons sued."

And see:

North Dakota vs. Chicago & N. W. R Co., U. S. Adv. Ops., 1921-22, p. 199;

Pennsylvania vs. Wheeling & B. Bridge Co., 13 How., 518, 559;

Cherokee Nation vs. Georgia, 5 Pet., 1, 20, per Marshall, C. J.

From the foregoing it is evident that a suit by one State against another cannot be predicated upon the mere relation of *parens patriae;* that something more than a willingness or desire to vindicate the supposed rights of the plaintiff's citizens is requisite; and that the multiplicity or unanimity of complaints by the citizens of the one State against the acts of the other cannot, by a process of aggregation or combination, be erected into a controversy between States or present a cause justiciable between such States.

If we are correct in the foregoing views, it then follows that no justiciable cause arises by reason of the alleged threatened deprivation or shortage of gas supply to the inhabitants of the plaintiff States. And much the more is this true in respect of the alleged infringement of constitutional guaranties of companies engaged in gas transportation, or of citizens of the plaintiff States alleged to have made investments in West Virginia, "since it is a well settled rule of this Court that it only hears objections to the constitutionality of a law from those who are affected by its alleged unconstitutionality in the features complained of." "The plaintiffs must show that their own rights are infringed."

Jeffrey Mfg. Co. vs. Blagg, 235 U. S., 571, 576;

New York Central R. Co. vs. White, 243 U. S., 188, 199;

Plymouth Coal Co. vs. Pennsylvania, 232 U. S., 531, 545;

Arkadelphia Mill Co. vs. St. Louis S. W. R. Co., 249 U. S., 134, 149;

Dahnke-Walker M. Co. vs. Bondurant, U. S. Adv. Ops., 1921-1922, p. 114.

If original jurisdiction is attempted to be sustained because of the supply of West Virginia gas to municipalities or public institutions in Ohio and Pennsylvania, the jurisdiction is equally negatived by the above cited cases. In *Louisiana vs. Texas,* 176 U. S., 1, 18, it was remarked by Mr. Chief Justice Fuller, in regard to controversies between states,—

> "there must be a direct issue between them, and the subject matter must be susceptible of judicial solution."

And again at page 22, it is said that,—

> "a controversy between states does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of *as in themselves committing one state to a distinct collision with a sister state.*" (Italics ours).

Later it was said by the same Chief Justice, with the concurrence of Harlan and White, JJ., in their dissent in *Missouri vs. Illinois,* 180 U. S. 208, 249, and not denied in the prevailing opinion of Mr. Justice Shiras, that,—

> "it must be made to appear that the States are in direct antagonism as states."

And in *Kansas vs. Colorado,* 185 U. S. 125, 145, the Chief Justice again said:

> "The gravamen of the bill is that the state of Colorado, acting directly herself, as well as through private persons thereto licensed, is depriving and threatening to deprive the State of Kansas and its inhabitants of the water heretofore accustomed to flow in the Arkansas River through its channel on the surface and through a subterranean course across the State of Kansas." * * *

The alleged right to West Virginia gas claimed by the plaintiffs for themselves and their inhabitants, if such right exists, is a right, not against the State of West Virginia, but against the gas companies to whom the plaintiffs and their inhabitants look for their gas supply. If the right exists against the West Virginia public service gas companies by whom the gas is furnished, either directly or remotely, it is manifest that the right can rise no higher than that of the companies themselves. As against the State of West Virginia the claim in substance is, not that West Virginia has directed its action against the plaintiffs, but that by the exercise of governmental power against the public service companies within the boundaries of West Virginia, the plaintiffs are, or may be, affected consequentially.

If, as against some of these companies, as citizens of West Virginia, a suit might conceivably be brought in this Court to compel them to furnish gas to or for the use of the plaintiffs in a sovereign or corporate capacity, it would, at best, involve a controversy between the plaintiff States and such companies and not a controversy between the plaintiffs and West Virginia. This

is a basis of jurisdiction not invoked in the present cases. Whether, if such a suit were brought, it would be necessary for West Virginia to intervene to uphold its statute, and in the interest of a full hearing upon the validity of the statute under which the gas companies ought properly to justify, we need not discuss. But it is apparent that:

(a) On the one hand, whether the West Virginia companies shall furnish gas to or for the plaintiffs, is at most, a matter of controversy between such companies and the plaintiffs, and not a controversy between the plaintiffs and West Virginia, within the meaning of the contitution; and,

(b) The question whether West Virginia may validly regulate its public service corporations in the manner attempted by the statute in litigation, involves a controversy between West Virginia and such corporations, and is not a controversy between States within the meaning of the constitution.

In either view,—and both views extend to the full scope of these cases—there is no original jurisdiction in this Court.

II

THE SUITS WERE NOT NECESSARILY PREMATURE MERELY BECAUSE NO ACTION WAS TAKEN BY WEST VIRGINIA OR ITS PUBLIC SERVICE COMMISSON UNDER THE STATUTE. THE SUITS WERE PREMATURE IN THE SENSE THAT AT THE TIME OF THE COMMENCEMENT OF THE SUITS, THE PRACTICAL OPERATION OF THE STATUTE HAD NOT BEEN TESTED, AND NO THREATENED INJURY OF SERIOUS MAGNITUDE WAS CLEARLY OR CONVINCINGLY PROVED OR SUSCEPTIBLE OF CLEAR OR CONVINCING PROOF.

The statute was passed February 10, 1919, and, apart from the injunctions herein, became effective under the West Virginia Constitution (Art. 6, sec. 30), ninety days after its passage, May 11, 1919. The bills were filed later in May, 1919, and the injunctions to prevent enforcement of the statute were issued June 3, 1919. So that no real opportunity occurred to test the statute in actual practice.

By the enactment of the statute, West Virginia imposed on the gas companies referred to the unconditional and mandatory duty to furnish to the specified consumers a reasonably adequate supply of gas (Acts of 1919, Ch. 71, sec. 1), and provided suitable procedure to coerce the performance of that duty by order of the Public Service Commission, which order could be enforced by penalties. (Secs. 2, 3, 4; and see Public Service Commission Act,—Acts of 1913, secs. 11, 17). Re-

covery of damages from disobedient companies was also provided for (sec. 5).

The bills charged, in substance, that, in addition to the infringement of other alleged constitutional rights, the enforcement of the statute would prohibit interstate transportation, and confine to West Virginia and absorb in local consumption the gas which otherwise would have been transported to the other States.

The answers aver, the progressively increasing shortage of gas, the enormous quantities of the gas transported to and for consumption in other States; the inadequacy of the supply to West Virginia consumers, resultant from the diminished production of West Virginia gas and its out-of-state consumption; and the purpose of the statute to compel the public service gas companies to perform their duties. The answers admit that by the furnishing of a reasonably adequate supply of gas for the use of the public in West Virginia, as required by the statute, the volume of West Virginia gas available for transportation to, or for consumption in, the other States, and the quantity of gas so transported, will be indirectly or incidentally diminished, unless the gas companies shall increase gas production in West Virginia. But it is alleged that in case of the failure to increase the production of West Virginia gas, whether or not the quantity transported to the other States will be appreciably decreased will depend in a large degree upon the apportionment of the gas transported from West Virginia by the seven large companies named among the several States desiring to consume the same. It is among other things denied that enforcement of the statute will require all, or substan-

tially all, of the West Virginia gas; or that the transportation of gas from West Virginia to the other States will be prohibited; or that the furnishing of a reasonably adequate supply to the West Virginia public, will require or consume any large proportion of the gas transported to, or for consumption in, other States. (Answer to Ohio bill, pp, 33, 34; answer to Pennsylvania bill, pp. 33, 34.) Aside from the manifest intention of West Virginia to enforce the statute, its purpose to impose fines, penalties and imprisonment in accordance with the statute, for disobedience of the authorized orders of the Public Service Commission, is specifically alleged. (Answer to Ohio bill, p. 40; answer to Pennsylvania bill, p. 44).

The proofs to which we have already sufficiently referred, showed the shortage of gas, which was to be anticipated from the beginning; that no further sources of supply were known or probable; that prior to the enactment of the statute the apportionment of West Virginia gas as between the consumers in that State and elsewhere was in fact determined by the gas companies, to the detriment of the West Virginia consumers; and that augmentation of the supply to West Virginia consumers would correspondingly subtract from the volume apportionable to consumers in the other States.

We think that the bills were timely in a single aspect, involving the broadest concessions in favor of the plaintiffs. Assuming that justiciable claims are presented by the plaintiffs in the character of *parens patriae* or as representatives of the whole body of gas consumers or inhabitants of the plaintiff States; and assuming further that any diminution of the quantity of

gas transported to those States, as a result of West Virginia's legislative action, affords ground for a more than frivolous contention that their gas consumers or inhabitants in the aggregate will be unconstitutionally deprived of gas or interfered with in the carrying on of interstate commerce—the bills were not premature.

With the foregoing assumptions, we think that if ever the plaintiffs, in the capacity of *parens patriae*, were to possess a justiciable right to contest the validity of the statute—though we deny the justiciable right—the right existed as well on the day of the filing of the bills as it could or would at any future time, insofar as they could supply the proof requisite in a controversy between States. The West Virginia public service gas companies were then subject to legislation which threatened a multiplicity of actions at law and proceedings before the Commission, calculated to enforce obedience (see *Smyth vs. Ames*, 169 U. S., 466, 518; *Ex parte Young*, 209 U. S., 123, 163).

> *Smyth vs. Ames*, 169 U. S., 446;
> *Ex parte Young*, 209 U. S., 123;
> *Public Service Co. vs. Corboy*, 250 U. S., 153;
> *Bacon vs. Rutland R. Co.*, 232 U. S., 135;
> *Coal & Coke R. Co. vs. Conley*, 67 W. Va., 129, 138, 67 S. E., 613;

That West Virginia, after enacting the statute and providing appropriate procedure and sanctions, or its Public Service Commission, has taken no additional action, does not appear to us to affect the question of prematurity from this standpoint. If further action by the State or Commission were requisite, what action must it be? Would it be enough that one aggrieved con-

sumer should complain to the Commission? Or must the Commission proceed to final order in his case? Would it suffice that the order should affect a few thousand cubic feet of gas, the deprivation of which would be inappreciable in the other States; or must there be a multiplication of proceedings, until, and under such circumstances that, the aggregate of deprivation becomes appreciable or of serious magnitude?

In *Ex Parte Young*, 209 U. S., 123, the injunction suits out of which the contempt proceeding arose were instituted on the day preceding that on which the statute was to become a law, the plaintiffs being stockholders of railroad companies again seeking to enjoin compliance with a State law fixing rates, alleged to be confiscatory. The question of prematurity of suit was urged in the contention that the constitutionality of the statute should be tested by disobeying it "at least once,' and defending against the consequences. But this Court refused to adopt this point of view.

While, therefore, we think that the suits were not premature as an attempt to show, in advance of further action on the part of West Virginia, that the statute is invalid on the ground that its enforcement would or might diminish the volume of West Virginia gas available for transportation to other States, the suits in every other aspect were premature.

Despite the argument of the plaintiffs to the contrary, it is hardly deniable that West Virginia possesses at least some right and power of regulation of its public service gas companies, to compel them to furnish gas to West Virginia consumers. The statute of Ohio, pre-

scribing "necessary and adequate service and facilities, which shall be reasonable and just," and the Pennsylvania law, requiring service "reasonably adequate and practically sufficient for accommodation of its patrons, employes and public," are substantially identical with the primary requirement of the statute now in question.

Ohio Gen. Code, sec. 614-12;

Penn. Public Laws of 1913, p. 1374; *Pub. Service Com. Laws*, Art. I, sec. 1.

Assuming, then, the possession by West Virginia of some power in the premises, and keeping in mind the established fact that an inadequate service is equivalent to none, the right and power of West Virginia must logically extend to something more than the compulsion of a worthless service. They must embrace the requirement of a reasonably adequate service.

And assuming the right and power of West Virginia to require a reasonably adequate service to its consumers, the effects of that requirement upon the plaintiffs and their citizens will necessarily depend upon the manner and extent of the application of the statute. To decide now, once and for all, the validity of the statute, would call upon the Court to determine from conflicting evidence,—much of it entirely conjectural,—the amount of gas requisite to afford a reasonably adequate supply for the designated West Virginia consumers; the probable action of the Public Service Commission; the reasonableness and effect of that action; the varying circumstances of the individual gas companies and the localities in the plaintiff States deriving gas from or through them; the extent of the diminution of the gas transported to the other States, by

reason of the operation of the statute, and the apportionment which the gas companies would make among the other States. These and other matters, readily occurring to the mind, rest as yet in the domain of either the disputable or the speculative. It is, of course, settled that "a statute may be invalid as applied to one state of facts, and yet valid as applied to another." (*Dahnke-Walker Mill Co. vs. Bondurant,* U. S. Adv. Ops., 1921-1922, p. 114, decided December 12, 1921).

Unless in this situation of the case this Court can now definitely anticipate and determine that the administration of the statute by West Virginia will necessarily and under all circumstances be in excess of the legitimate right and power of that State and constitute an abuse of that right and power, and that as a result an injury of serious magnitude will be inflicted on the plaintiffs or their citizens, these suits are premature.

In *Prentis vs. Atlantic Coast L. Co.,* 211 U. S., 210, in which the question of prematurity of the suit arose, the decision turned upon the fact that the rates fixed by the Virginia Corporation Commission were subject to review and change upon an appeal to the Court of Appeals of that State. It was thought by this Court that the railroad companies, in filing their bills in advance of application to the Court of Appeals, did not "make sure that the State, in its final legislative action, would not respect what they think their rights to be, before resorting to the Courts of the United States." And it was added that when, upon application to the Court of Appeals, "the rate is fixed, a bill against the Commission to restrain the members from enforcing it, will not be bad as an attempt to enjoin legislation, or

as a suit against a State, and will be the proper form of remedy." (211 U. S., 230).

Subsequently, in *Bacon vs. Rutland R. Co.*, 232 U. S., 135, it was said that in the *Prentis Case* it was held proper, before resorting to the Circuit Court of the United States, "to make sure that the officers of the State would try to establish an unconstitutional rule." (232 U. S., 137).

In *Wadley S. R. Co. vs. Georgia*, 235 U. S., 651, it was held that an order of the railroad commission could not be assailed in a suit to recover penalties for its violation, where the defendant has not proceeded in the manner prescribed by the statute to test the validity of the order.

The recent decision in *Oklahoma Nat. Gas Co. vs. Russell*, U. S. Adv. Ops. 1922-23, p. 395, concerned only a *pendente lite* remedy, during appropriate procedure in the State court.

But irrespective of the non-action of West Virginia or its Public Service Commission, the result is the same, unless it be held that any and every act of enforcement of the statute, and any and every subtraction from the West Virginia gas transported to the other States, must inevitably injure the plaintiffs, whether in their sovereign character or as mere consumers of gas.

The presumption being in favor of the validity of the statute and the burden being on the plaintiffs to show a violation of constitutional guaranties, even in a suit between litigants other than States there could

be no declaration of unconstitutionality upon mere loose opinion or conjecture. "The fact must be tested by the actual transaction." (*Western U. T. Co. vs. Speight*, 254 U. S., 17). The repeated refusal to declare public service rates confiscatory in advance of actual test is illustrative. It has been held frequently that an attack upon a rate prescribed by State statute is premature in the absence of clear and convincing proof that the rate will have the alleged effect.

> *Smyth vs. Ames*, 169 U. S., 466;
> *Knoxville vs. Knoxville Water Co.*, 212 U. S., 1, 18, 19;
> *Willcox vs. Consolidated Gas Co.*, 212 U. S., 19, 54;
> *Northern Pacific R. Co., vs. North Dakota*, 216 U. S., 579;
> *Des Moines Gas Co. vs. Des Moines*, 238 U. S., 153, 173;
> *Missouri vs. Chicago, B. & Q. R. Co.*, 241 U. S., 533, 539, 540.

In *Grand Trunk R. Co. vs. Michigan R. Com.*, 231 U. S., 457, an order requiring railroad companies to allow joint use of trackage was attacked as an interference with interstate commerce. The case was heard upon conflicting affidavits as to the effect of the enforcement of the order. Mr. Justice McKenna, after pointing out on page 464 that "the contention is premature," proceeds on page 465 as follows:

> "It is too late in the day to question the competency of a state to create a commission and to give it the power of regulating railroads, and necessarily of investigating the conditions upon

which regulation may be directed. If a judicial interference is sought with the exercise of such power, it must be clearly shown to have been transcended, not left as a conclusion from the balancing of conflicting affidavits, or even, it may be, as held by the district court, on *ex parte* affidavits. Courts are reluctant to interfere with the laws of a state or with the tribunals constituted to enforce them. Doubts will not be resolved against the law, nor the decision of its tribunals prevented or anticipated unless the necessity for either be demonstrated."

This being true in ordinary litigation, much the more is it true in a controversy between States.

In *Kansas vs. Colorado*, 206 U. S., 46, 117, the bill was dismissed, after hearing on the merits, for the reason, among other things, that while perceptible injury to portions of the Arkansas Valley in Kansas had been shown, the right of Colorado to divert water from the Arkansas River for irrigation purposes had not yet reached the point at which it could be held that the diversion was in excess of Colorado's rights, and that the injury to Kansas had not attained a scope sufficiently great to sustain a suit between the two States.

In *Missouri vs. Illinois*, 200 U. S., 496, 521, it was said by Mr. Justice Holmes in rendering an opinion, followed by a dismissal of the bill without prejudice:

"Before this court ought to intervene, the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to

maintain against all considerations on the other side."

In *New York vs. New Jersey*, 256 U. S., 296, involving the effect of the Passaic sewerage project on New York, it was said by Mr. Justice Clarke:

> "With the record in this state we come to consider the evidence introduced, but subject to the rule that the burden upon the state of New York of sustaining the allegations of its bill is much greater than that imposed upon a complainant in an ordinary suit between private parties. Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of serious magnitude, and it must be established by clear and convincing evidence. *Missouri vs. Illinois*, 200 U. S., 496."

To the same effect, see:

Kansas vs. Colorado, 185 U. S., 125;
Missouri vs. Illinois, 180 U. S. 208.

III.

THESE CASES MUST BE CONSIDERED IN THE LIGHT OF THE PECULIAR NATURE OF GAS AND OF THE GAS COMPANIES, AND THE EXCEPTIONAL RULES OF LAW APPLICABLE THERETO.

We premise discussion of the merits by reference to the fundamental fallacy which underlies the contentions of the plaintiffs. Basing their claim of right to West Virginia gas produced by West Virginia gas companies, they overlook the peculiar nature of the commodity itself and the exceptional status of the corporations, through and under which the plaintiffs seek to maintain their supply.

The previous narrative has sufficed to mark natural gas and the natural-gas industry as peculiar, because of the inherent and antecedently known limitations upon the sources of supply and the inevitability and proximate approach of decline and exhaustion. In this regard natural gas differs essentially from other commodities, and even from those dealt in by ordinary public-service corporations supplying water, artificial gas or electricity. The waters of a water company are continually replenished from seemingly undiminished natural reservoirs; an artificial-gas company can always manufacture new gas; an electric company can generate new power indefinitely. And in the instance of a public utility supplying services, as distinguished from a commodity, such as a railroad or a telephone line, the rendition of the service operates in no degree to diminish the volume of future service. Such instrumen-

talities may wear out, but they can be duplicated from an abundance of materials.

It is a result that natural gas, and rights therein, are in many respects governed by exceptional rules of law. Illustrations are found in *Brown vs. Spilman*, 155 U. S., 665, 669, 670, holding that "decisions in ordinary cases of mining, for * * * minerals which have a fixed *situs* cannot be applied to contracts concerning" gas "without some qualification;" in *Ohio Oil Co. vs. Indiana*, 177 U. S., 190, holding valid a statute prohibiting the escape of gas in the air longer than two days, and *Walls vs. Midland Carbon Co.*, 254 U. S., 300, sustaining the prohibition, in certain circumstances, of the manufacture of carbon-black from gas, it being said that in both instances the power of regulation was "dependent upon the natures of oil and gas;" and *Westmoreland & C. Nat. Gas. vs. Dewit*, 130 Pa., 235, 18 Atl., 724. (And see *Bacon vs. Walker*, 204 U. S., 311, 316). Consequent on this follows the inadmissibility of the indiscriminate application to natural gas and to public service corporations engaged in its production, transportation or supply, of legal principles applicable to ordinary commodities and to individuals and corporations dealing in or with ordinary commodities.

IV.

THE STATUTE DOES NO MORE THAN TO DECLARE, AND TO PRESCRIBE APPROPRIATE PROCEDURE FOR THE ENFORCEMENT OF, THE OBLIGATION OF EACH PUBLIC SERVICE GAS COMPANY TO FURNISH REASONABLY ADEQUATE SERVICE WITHIN REASONABLE TERRITORIAL LIMITS. IT DOES NOT REQUIRE UNREASONABLE SERVICE OR UNREASONABLE EXTENSION BY ANY COMPANY.

We postpone the question of power to statement of the substance of the principal clauses of the statute. In pronouncing upon its constitutionality, the Court will not declare it invalid "on surmise or on the barren letter of the statute" (*Bacon vs. Walker,* 204 U. S., 311, 317; and see *Walls vs. Midland Carbon Co.,* 250 U. S., 300). It is to be accorded a constitutional construction, if permitted by a fair interpretation of its language. (*Hooper vs. California,* 155 U. S., 648, 657.)

SECTION 1.

This section, the dominant provision of the statute, has the following scope:

(a) *The persons to whom the statute applies*:

They are those persons, natural or corporate, who are actually engaged in the service of natural gas to the public, or who are required by law so to do. The language of description is, "Every person engaged in furnishing, or required by law (whether statutory or common law) to furnish, natural gas for public use, or for the use of the public, or any part of the public,

whether for domestic, industrial or other consumption, within this State." * * *

"Person" as above used is defined by Section 7 to include "persons, firms and corporations." Because in the great majority of cases the supply of gas to the public is by corporations, we generally refer in this brief to the entire class as public service corporations. (*Van Dyke vs. Geary*, 244 U. S., 39; *Hardman vs. Cabot*, 60 W. Va., 664, 55 S. E., 756.)

The persons "engaged in furnishing natural gas for public use," can be no more clearly defined than by the phrase itself.

As to those "required by law" so to do, the legal obligation may arise from the terms of corporate charters, or, irrespective thereof, as a necessary implication from the acceptance of municipal franchises, the use of public highways, by permission of the public authorities, for the transportation of gas, and the exercise of the right of eminent domain.

In *Charleston Nat. Gas. Co. vs. Lowe*, 52 W. Va., 662, 671, 44 S. E., 410, involving a city franchise to supply gas, it was asked and answered:

> "But have the citizens of Charleston an absolute and indefeasible right to the use of the gas upon reasonable and equal terms? Is the company bound to furnish gas to all who apply for it without an express legislative imposition of that duty upon it? Undoubtedly. The courts have so held in many of the States, and their decisions are grounded upon both reason and the best of authority."

And *Gibbs vs. Consolidated Gas Co.*, 130 U. S., 396, was quoted as follows:

> "These gas companies entered the streets of Baltimore, under their charters, in the exercise of the equivalent of the power of eminent domain, and are to be held as assuming an obligation to fulfill the public purposes to subserve which they are incorporated."

And see *Franke vs. Johnstown Fuel Supply Co.*, 70 Pa. Super. Ct., 446, 457.

In *Hardman vs. Cabot*, 60 W. Va., 664, 55 S. E., 756, it was stated by the Court:

> "The legislature, in expressly authorizing the use of highways, under permission of the county courts, by corporations, engaged in the service of the public, for the location and operation of their gas pipes, has declared that such use is proper."

And again:

> "To hold the contrary, as regards pipe lines for conveying gas, water and other supplies, would be most disastrous to cities, towns and counties of this State, in which hundreds, possibly thousands, of miles of such pipes have been laid in the highways, without any thought on the part of the fee owner of any right in him to prevent it, until payment of compensation should be made."

And still further, on page 669:

> "What has just been said, it must be observed, assumes that the grantee of this permission will use the pipe line in the service of the public."

In *Carnegie Nat. Gas Co. vs. Swiger*, 72 W. Va., 557, 571, 79 S. E., 3, involving one of the seven companies already mentioned, it was said:

> "We observe that the Legislature, by general law, has conferred upon pipe-line companies, organized for transporting oil and natural gas, the right of eminent domain, and has thereby necessarily imposed upon them, as public-service corporations, the right and duty of performing a public service. That right and duty is fixed as firmly as if written into the statute. * * * Pipe-line companies organized for transporting gas must serve the public with gas, under reasonable and proper regulations, along the entire line traversed, and for reasonable rates fixed by themselves, or by statute, or by contracts or ordinances of municipalities. * * * The rights of the people are thus protected in nearly every case where the public is served by public service corporations, furnishing water, gas, electricity, or transportation."

The category to which the statute thus applies, embraces all of the persons, natural or corporate, about sixty-seven in number, supplying gas to the public (Rec. 982); and it will embrace all others who, in the future, shall similarly engage or obligate themselves to engage in such supply.

But the statute does not include, among those on whom it imposes the duty of reasonably adequate supply, persons, natural or corporate, not engaged, or obligated to engage, in the supply of gas to the public. This exclusion is based on the obvious absence of legislative power to affect with a public use property not

devoted to the public use by the act or consent of a private owner. (*Producers Transp. Co. vs. Railroad Commission*, 251 U. S., 228, 230; *Weems Steamboat Co. vs. Peoples Steamboat Co.*, 214 U. S., 345; *Munn vs. Illinois*, 94 U. S., 113, 126.)

In 1919, the total gas production of West Virginia was, as previously stated, 219,886,837 M cubic feet, of which 183,687,047 M was in the hands of the public service companies, leaving 36,199,790 M feet in the possession of private owners, an amount largely in excess of the 29,360,811 M supplied to West Virginia consumers by the seven companies.

Nothing in the statute now involved or any other law of West Virginia, affects the disposition of this privately owned gas, whether in interstate commerce or otherwise. The owner, not obligated to supply gas to the public in West Virginia by his voluntary engagement, or the acceptance of special rights and privileges, such as franchises, user of highways under public permission, or the exercise of eminent domain, may, if he sees fit, construct or operate a pipe line without the aid of such special rights and privileges. His ownership of the gas, his ownership or operation of the pipe line, or the transportation of the gas, or all combined, would impose on him no duty of public gas supply in the State.

(b) *The area of service and persons to be supplied*:

The area of service of each gas company is the territory within which that company produces, or through which it transports, or within which it serves its gas. The persons to be supplied are those within the above

limited territory, who desire and apply for gas and are ready and willing to pay for it at lawful rates.

The language of the statute is that these public service companies shall "furnish for public use within the territory of this State, and for the use of the public and every part of the public within the territory of this State, in or from which such gas is produced, or through which said gas is transported, or which is served *by such person.*" And that the area of service is confined to the particular territory of the production, transportation and service of that particular public service company, is reiterated and emphasized in the later clauses of the section, where, in defining the purposes for which the reasonably adequate supply may be required, the consumption is restricted to "the public, or any part of the public, within *said* territory of this State." The delimitation of area is again emphasized in Section 2, under which a gas company seeking to make good its own deficiency of supply, must be engaged in furnishing gas to the public in the same territory in which the other company, from whom gas is to be obtained, produces the gas, or through which the latter transports it, or in which the latter serves it.

The assertion persistently thrust forward by the plaintiffs, that all of the people of West Virginia must be served adequately before the public service companies can transport to other states, and involving the assumption that each company is severally obligated to service in every part of West Virginia, is wholly unwarranted, and contrary to the plain terms of the Act. Had this fantastic result been intended, the appropriate requirement would have been to furnish gas to all inhabitants

of the state, without qualification, a meaning not attributable to the phrase "within the territory of this State." But the possibility of ambiguity is removed by the qualifying clause immediately following, defining and limiting "the territory of this State" to that particular area "in or from which such gas is produced, or through which said gas is transported, or which is served *by such person;*" the last three words, "by such person," relating to and yet further qualifying and limiting this territory to the locality in which the particular company produces, transports or serves.

Stating the matter concretely, the Hope Natural Gas Company is required to supply reasonably adequate service in the territory in which it produces, or through which it transports or in which it supplies gas. If in other territory, in which the Manufacturers Light & Heat Company or the United Fuel Gas Company operates, a shortage of gas exists, it is of no concern to the Hope Natural Gas Company. The latter must supply its own territory in reasonable adequacy, and is bound to do no more.

The designation of the area of duty as the territory of production, transportation and service, requires little comment. In this respect it does not expand the duty which existed before. The object of the statute, indeed, was to declare and enforce the duty of reasonably adequate service in the localities which the companies were theretofore obligated to serve.

The holders of municipal franchises, irrespective of this statute, are compellable to supply gas to consumers along their lines. The companies owning pipe lines are

under a similar obligation. In *Carnegie Nat. Gas Co. vs. Swiger,* 72 W. Va., 557, 571, 79 S. E., 3, it was said.

> "Pipe-line companies organized for transporting gas must serve the people with gas, under reasonable and proper regulations, along the entire line traversed and for reasonable rates fixed by themselves, or by statute, or by contracts or ordinances of municipalities."

But in order to entitle a consumer to service, it is unnecessary that he should dwell in immediate contact with an existing gas main. In 1 *Wyman, Public Service Corp.*, Sec. 281, the writer says:

> "Certainly all premises situated within the network of the existing mains and within *convenient connecting distance* of their lines should be served. All of these premises come within the sphere of influence, already established, differing slightly from premises abutting."

In condemnation petitions some of the seven gas companies, in not dissimilar terms, profess a readiness and willingness to "sell and deliver gas to all parties *within reaching distance of its pipe lines*, who apply for the same at reasonable rates." (Rec. 1857, 1876.)

A gas company, moreover, is under the duty, even in the absence of a statute, to extend its mains or lines "so as to meet the reasonable requirements of the community."

Russell vs. Sebastian, 233 U. S., 195, 208, 209.
New York vs. McCall, 245 U. S., 343.
People ex rel. Woodhaven Gas Light Co. vs. Deehan, 153 N. Y., 528, 533, 47 N. E., 787.

Lukrawka vs. Spring Valley Water Co., 169 Cal., 318, 146 Pa., 640.
United States Tel. Co. vs. Central Union Tel. Co., 202 Fed., 66, 71.

The question in every instance, as pointed out in the *Lukrawka Case*, is one of reasonableness, to be determined as a question of fact. That was the view taken in *New York vs. McCall*, 245 U. S., 345, 351, where, in sustaining an order requiring an extension of about one and one-half miles by a gas company, Mr. Justice Clarke said:

> "Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve, and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render."

And it was added that the determination of such questions,—

> "Is one of the important purposes for which these administrative commissions, with large powers, were called into existence, with an organization and with duties which peculiarly fit them for dealing with problems such as this case presents." * * *

So in the present instance, the area of service in each case is left for the determination of the Public Service Commission, as a question of reasonableness, in the light of the particular facts and circumstances.

The Commission must consider the consumer's needs, the company's gas supply, and the cost and remunerativeness of the service. The decision of the Commission is subject to judicial review.

(c) *The quantity of gas to be furnished*:

The volume of gas required to be furnished is a reasonably adequate supply. And this involves both quantity and economy of consumption. In the precise words of the statute, it is "a supply of natural gas reasonably adequate" for the public uses specified.

The requirement of reasonably adequate service is no greater than that at common law. In *Cumberland Tel. & T. Co. vs. Kelly*, 160 Fed. 316, 324, Judge Lurton, in the Circuit Court of Appeals, said:

> "Telephone companies, like similar quasi-public corporations, are under a general common law obligation to supply reasonably adequate facilities for supplying the service which they hold themselves out to do."

In *Russell vs. Sebastian*, 233 U. S., 195, 208, in speaking of a gas company, it was said by Mr. Justice Hughes, with citation of authorities:

> "Incident to the undertaking in response to the State's offer was the obligation to provide facilities that were reasonably adequate."

And see *United States Tel. Co. vs. Central Union Tel. Co.*, 202 Fed., 66, 71.

In *Oklahoma Nat. Gas Co. vs. Oklahoma,* U. S. Adv. Ops., 1921-22, p. 331, it was said as against the claim of unconstitutionality by a gas company:

> "Both the commission and the Supreme Court decided, construing the charter of the company, that it, the company, was required to render *efficient service,* and we concur in that view, and that it was competent for the State to compensate the deficiency in the service—deficiency in the supply of gas—by a rebate of payments to the company. The percentage of reduction, and its adequate relation to the deficiency in service were necessarily determined by the commission from the case as presented to it, and the Supreme Court, upon consideration, affirmed the determination as a just and supported relation." (*Italics ours.*)

The duty of reasonably adequate service, in identical or equivalent words, is imposed by the statutes in numerous States dealing with public utilities, including natural gas companies.

Pennsylvania Pub. Service Com. Law, Art 2, sec. 1 (*Pa. Pub. Laws of 1913,* p. 1374);
New York Pub. Service Com. Law, sec. 65 (*Laws of 1910,* ch. 480);
Pennsylvania Gas Co. vs. Pub. Service Com., 252 U. S., 23, 27;
Indiana Public Utility Law, sec. 7 (*Acts o' 1913,* Ch. 76);
Ohio General Code, sec. 614-12.

As previously stated, reasonable adequacy of supply is more easily described than defined. In order tc have value gas must be dependable, ready and constant. The whole matter is summed up in the statement of

Judge James H. Reed, President of the Philadelphia Company, heretofore quoted (Rec. 525), that a man cannot be satisfied by giving him fifty per cent. of his requirements, that "his wife can't cook with it, and his house is cold. He either wants all or none."

(d) *The purpose or use for which gas is to be furnished*:

The gas is required to be supplied for the domestic, industrial and other public uses for which gas is consumed or desired to be consumed, within the territory already mentioned. The exact languarge of the statute is: "for the purposes, whether domestic, industrial or otherwise, for which natural gas is consumed or desired to be consumed by the public, or any part of the public, within said territory in this State, and for which said consumer or consumers therein shall apply and be ready and willing to make payment at lawful rates."

The specification of domestic and industrial purposes needs no explanation. The phrase "or otherwise" is of course to be construed in harmony with the associated words. *(2 Sutherland, Stat. Const.—Lewis 2 Ed.,* sec. 422.)

The corporate charters and condemnation petitions quoted or referred to in the Statement of facts, mention "other" classes of consumption in words similar to those of the statute.

Aside from domestic and industrial consumption, the gas companies have ordinarily recognized and pro-

vided separately for other classes of consumption, such as those of public buildings and institutions, churches, hospitals and the like; street lighting, and oil and gas field work.

This is reflected, for example, by the division of the gas sales by the Manufacturers Light & Heat Company into domestic, industrial, public institution and miscellaneous consumption (Rec. 84-87). So in the case of the Ohio Fuel Supply Company, where the division is among domestic, public building, industrial and other uses (Rec. 661, 662). Similar differentiation is found in the rate schedule of the Pittsburgh & West Virginia Gas Company (Rec. 1935). The words 'desired to be consumed" do not enlarge the category of consumption embraced by the phrase "domestic, industrial or otherwise." The words had in view the condition which the statute sought to remedy, to-wit, that the public or part of the public entitled to gas might be without it, and though entitled and desiring to have it, could not be said to be consuming it presently. It is to be observed, also, that the necessity of application to the Public Service Commission in case of refusal of service by a gas company sufficiently guards against the abuse of the statute.

(e) *The extent of the gas supply from which the reasonably adequate service is to rendered*:

The requirement is that each gas company shall render reasonably adequate service to the extent of that company's gas supply produced in West Virginia. The exact words of the statute are: "to the extent of

his supply of said gas produced in this State, (whether produced by such person or by any other person)."

The clause is at once a definition and a limitation. Some of the gas companies, such as the Manufacturers Light & Heat Company and the United Fuel Gas Company, produce and buy gas in other States; the Manufacturers Light & Heat Company in Pennsylvania and Ohio, and the United Fuel Gas Company in Kentucky. Some of the West Virginia companies are in intimate corporate relation with companies in the other States, which produce and buy gas in those States. The relationships of the Hope Natural Gas Company with the Peoples Natural Gas Company and the East Ohio Gas Company, of the Pittsburgh & West Virginia Gas Company with the Philadelphia Company and the Equitable Gas Company, and of the United Fuel Gas Company with the Ohio Fuel Supply Company are examples. It was recognized that the West Virginia gas companies could not in reason be expected to import from other States gas to supply West Virginia. The other States themselves, equally with West Virginia, might require their gas companies to apply the gas produced in those States to the reasonably adequate service of the consumers therein. Having this in view, the statute confines its requirement of adequate service by any gas company to the extent of the supply of that company produced in West Virginia.

But subject to the limitation above, it is the intention of the statute that each gas company shall render reasonably adequate service to the consumers in the prescribed territory of that gas company, even though such service appropriates that company's entire

supply of gas produced in West Virginia. For if it is true that the public service gas companies of the State are obligated to furnish a reasonably adequate gas service, it logically follows that they must devote thereto the quantity of gas requisite for the rendition of the service.

The evidence in these cases establishes what is inherently manifest,—that an inadequate gas service is substantially equivalent to no service; that the diminishing stock of gas renders it impossible to render adequate service to everyone, wherever situate; that the reasonable and practical remedy is to contract the area of service and to diminish the number of consumers; that, other things being equal, in time of shortage the better supply, by physical necessity, is and will be received by the consumers nearest the sources of production (Rec. 50, 51, 392, 393); that the worst service is and will be obtained by the consumers farthest from such sources, and their service will inevitably grow worse from year to year as the available gas diminishes; and that in the elimination of consumers, both the nature of the service and economy of operation by the gas companies, point to the consumers at the greatest distance from the sources of production as those whose gas supply should be cut off.

In enacting this statute, therefore, West Virginia had regard not only to its legal right to priority of adequate service at the hands of its public service corporations, but also to the fact that there can be no such thing as a parity of right to, or equality of service of, a commodity by nature limited in quantity and unrenewable, constantly diminishing, valuable when ade-

quately supplied and valueless when rendered inadequate by excessive partition. The solution accorded by West Virginia to the problem is sufficiently explained and justified by the following quotation from an exhibit filed by the plaintiffs (Rec. 1668-1669):

> "In considering the question of the desirability of making new extensions after a natural gas supply has become depleted, so as to make satisfactory service for all impossible, two distinct viewpoints have been developed, namely:
>
> "The Indiana Supreme Court in 1901 held that:
>
> 'A natural gas company * * * can not refuse to permit connections with its mains by unsupplied citizens because the gas pressure has fallen so low that existing customers can not be adequately supplied, and that the court should compel the company to permit participation in the supply of gas furnished by it, although it can not furnish enough to satisfy the needs of its existing customers.' (*State of Indiana ex. rel. Wood vs. Consumers Gas Trust Co.*, 55 Lawyers Reports. 245).
>
> "The New York Public Service Commission, second district, in 1915, held that:
>
> 'Consideration must be given to a safe and adequate service on the part of the company, within its means and facilities, and if service of this character is being given to a comparatively few customers in a certain locality, with the eliminated (*sic*) amount of gas available for such purpose, it is manifestly the duty of this commission to permit the continuance of such service rather than order

the company to turn its gas into a larger field where a safe and adequate service could not be given.' (New York Public Service Commission, second district, North Tonawanda case No. 4478, Feb. 25, 1915.)

"The Indiana viewpoint is merely a blind following of obsolete precedent. Furthermore, it is based on the erroneous theory that it is a matter of no consequence whether adequate service can be given to any customers, so long as all of the customers stand on an exact equality, and fails to recognize that there is a clear distinction between equity and equality, and that the two are not synonymous.

"The New York viewpoint is in accordance with the spirit and letter of up-to-date public utility regulation and recognizes the inherent characteristics and natural limitations of the natural gas industry, and that usable service to a limited number is better than poor or no service to a large number. *This New York viewpoint is the just and equitable one to apply to all new service extension problems, as well as to the inevitable problem that will arise in the near future, of limiting or discontinuing the service entirely in certain localities, because the available supply as furnished by nature will not permit the continuance of a usable service to all.*"

See, also, *People ex rel. Pennsylvania Gas Co. vs. Public Service Com.*, 189 N. Y. Supp., 478.

The doctrine of *State vs. Consumers Gas Trust Co.*, 157 Ind., 345, 61 N. E., 674, above cited, is referred to by *Wyman on Public Service Corporations*, Vol. 1, Sec. 253, where the author, after saying that the rule of equal division there sanctioned is opposed to that applied in irrigation cases, continues as follows:

> "Logical though it may be, it seem to the writer to be lacking in appreciation of the situation as a whole. A rule which may result in satisfactory service to none, not even to the applicant in question, is hardly consistent with service at all. Certainly where the supply now available is not sufficient to meet the proper demands of present customers, it would seem that later applicants could not demand the reduction of the undertakings of older customers."

And see also, as bearing generally upon the subject, the following authorities relating to irrigation companies having a water supply inadequate for the service of all applicants.

1 *Wyman on Pub. Serv. Corp.*, Sec. 252;
San Diego Flume Co. vs. Souther, 112 Fed., 228;
McDermont vs. Anaheim Union Water Co., 124 Cal., 112, 56 Pac., 779;
Bardsley vs. Boise Irr. & Land Co., 8 Idaho. 155, 67 Pac., 428;
Brown vs. Farmers &c. Co., 26 Col., 66, 56 Pac., 183.

Section 2.

This section provides for the sale of gas in certain instances by a public service gas company having a surplus of gas to another public service gas company engaged in the furnishing of gas in the same territory, but having a production or supply which is, or probably will be, insufficient for the supply of its consumers in that territory. This is merely an alternative method of service given to the gas company having the surplus, whereby in lieu of direct service to those consumers which it is obligated to supply under section 1, it may perform its obligation to those consumers through the medium of another public service company (generally a local distributing company) engaged in serving the same consumers in the same territory.

The requirement to sell gas to another public service company is neither mandatory nor self-executing. The company having the surplus may, if it sees fit, furnish gas by direct service to the consumers in its own territory, to supply whom gas is proposed to be purchased by the company suffering the deficiency. If this direct service is undertaken and performed, the sale of gas to another gas company cannot be compelled.

If the company having the surplus does not undertake the direct service of consumers in its territory inadequately supplied, even then it cannot be compelled to sell gas to the company having the shortage, except after an order of the Public Service Commission, entered upon due notice and after hearing and proof, and which order is subject to judicial review. Before an order for sale can be made by the Commission, it must be proved:

(a) That the selling company is furnishing or obligated to furnish gas in the territory served by the purchasing company, and in which the latter has, or probably will have, insufficient gas.

(b) That the selling company has a supply of gas in excess of that required for the reasonably adequate service of its own consumers in West Virginia;

(c) That the selling company is producing or furnishing gas for public use in, or transporting the same through, the territory in which the purchasing company is engaged in the public service; and

(d) That the selling company has failed or refused to furnish direct service to the insufficiently supplied consumers, as required under section 1.

If the foregoing matters are proved, the Commission must determine whether "public convenience and necessity" require the sale of gas by the selling company to the purchasing company, and whether a physical connection between the lines of the two companies shall be made. Having so determined, the Commission may order the sale of gas by the selling company to the purchasing company and the establishment of the physical connection. The Commission is to prescribe the times and amounts of the gas to be sold, fixing just and reasonable terms, conditions and rates; and is to fix just and reasonable terms and conditions for such physical connection, including just and reasonable rules and regulations and provision for the payment or apportionment of the cost and expense of making the same.

This alternative provision for the sale of gas, with physical connection for its delivery, in pursuance of an order of the Commission, requires a service which the voluntary acts of the companies have shown to be reasonable and practicable. Sales of gas by many of the seven companies to local companies, with necessarily accompanying physical connections, have occurred in numerous instances (Rec. 275-277, 842, 843, 1028, 1034-1036, 1209, 1220, 1227, 1724, 1728; 1736, insert pp. 280, 297, 314, 315, 349, 402, 414). Most of the seven companies sell to, or purchase from, one or more of the others, by means of physical connections. The necessity for legislation sprang up not because such sales and physical connections are impracticable or unreasonable, but because since the development of the gas shortage some of the seven companies have refused to sell gas to local companies in their own territories whose supplies were insufficient; while another has refused to do more than to sell from any surplus existing after the performance of other contracts, and without obligation as to amount or time, and with the contract subject to cancellation on brief notice (Rec. 1209, 1230, 1231).

SECTIONS 3 AND 4.

These sections expressly confer on the Public Service Commission jurisdiction over the subject matter of the statute, and by reference to the Public Service Commission Act adopt its procedure, including the right of appeal to the Supreme Court of the State. The scope of review upon such an appeal is the same as that accorded upon judicial review of orders of the Interstate Commerce Commission, as stated in *Inter-*

state Commerce Commission vs. Union Pac. R. Co., 222 U. S., 551, 557. The Supreme Court may inquire into the evidence in order to determine whether the order of the Commission is "beyond the power which it could constitutionally exercise; or beyond its statutory power; or passed upon a mistake of law;" or whether a "rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law;" or whether the Commission has acted so arbitrarily and unjustly as to make an order contrary to evidence or without evidence to support it; or whether the authority involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power.

> *United Fuel Gas Co. vs. Public Service Com.,* 73 W. Va., 571, 583, 80 S. E., 931;
> *Clarksburg Light & H. Co. vs. Public Service Com.,* 84 W. Va., 638, 100 S. E., 551.
> *Kelley Axe Mfg. Co. vs. Public Service Com.,* 87 W. Va., 368, 373, 105 S. E., 152.

SECTION 5.

This section prescribes penalties, not for violation of the provisions of the statute, but for failure or refusal "to comply with any requirement of the Commission hereunder." The ample opportunity for hearing before the Commission before a penalty can attach, brings the secton within the analogy of *Wadley S. R. Co. vs. Georgia,* 235 U. S.,652. In any event section 8 of the statute renders the penal section separable, if for

any reason invalid or unenforcible. Still further, under the settled constructions of the West Virginia Supreme Court, such a penalty would not be incurred during judicial contest of the constitutionality of the statute.

> *Coal & Coke R. Co. vs. Conley*, 67 W. Va., 129, 67 S. E., 613.
>
> *Wadley Southern R. Co. vs. Georgia*, 235 U. S., 651, 668.
>
> *Chesapeake & O. R. Co. vs. Conley*, 230 U. S., 513, 521.

SECTION 6.

This section confers a right of action for the recovery of compensatory damages by suit in a court of competent jurisdiction, where full defense may be made.

SECTION 7.

This section defines the word "person" as meaning and including "persons, firms and corporations."

SECTION 8.

This section is as follows:

> "That the sections, provisions, and clauses of this act shall be deemed separable each from the other, and also in respect to the persons, firms, corporations, and consumers mentioned therein or affected thereby, and if any separable part of this act be, or be held to be unconstitutional or for any reason invalid or unforcible, the remaining parts thereof shall be and remain in full force and effect."

V.

THE WEST VIRGINIA PUBLIC SERVICE GAS COMPANIES, INCLUDING THE SEVEN COMPANIES, WERE AND ARE OBLIGATED, IRRESPECTIVE OF THE STATUTE IN CONTEST, TO FURNISH WEST VIRGINIA CONSUMERS A REASONABLY ADEQUATE SUPPLY OF GAS, AND THEY CANNOT LAWFULLY ABANDON OR DISABLE THEMSELVES FROM PERFORMING THE OBLIGATION.

SPECIAL RIGHTS AND PRIVILEGES OF GAS COMPANIES.

All of the incorporated gas companies, including the seven, are West Virginia corporations, or corporations of other States, admitted to carry on business in West Virginia, under the statute extending to foreign corporations so admitted "the same rights, powers and privileges that are conferred on domestic corporations created for the same purpose," and subjecting them "to the same regulations, restrictions and liabilities that are imposed upon like corporations" created by West Virginia.

Hydro Electric Co. vs. Liston, 70 W. Va., 83, 91; 73 S. E., 86.

Carnegie Nat. Gas Co. vs. Swiger, 72 W. Va., 557, 572, 79 S. E., 3.

Precedent to the statute in controversy, these companies were at common law and by statute denominated as public service corporations, and were subject to the Public Service Commission Act.

Charleston Nat. Gas Co. vs. Lowe, 52 W. Va., 662, 44 S. E., 410.

Hardman vs. Cabot, 60 W. Va., 664, 55 S. E., 756.

Carnegie Nat. Gas Co. vs. Swiger, 72 W. Va., 557, 79 S. E., 3.

W. Va. Acts of 1913, Ch. 9, Sec. 3.

W. Va. Acts of 1915, Ch. 8.

United Fuel Gas Co. vs. Public Service Com., 73 W. Va., 571, 80 S. E., 931.

Clarksburg Light & H. Co. vs. Public Service Com., 84 W. Va., 638, 100 S. E., 551.

Kelley Axe Mfg. Co. vs. Public Service Com., 87 W. Va., 368, 105 S. E., 152.

Manufacturers Light & Heat Co. vs. Ott, 215 Fed., 940.

Those owning pipe lines were, in their capacity of pipe-line companies, common carriers, "subject to all the duties and liabilities of such carriers under the laws" of West Virginia.

Code of W. Va. (1913), Ch. 52, Sec. 24.

W. Va. Acts of 1891, Ch. 113.

Charleston Nat. Gas Co. vs. Lowe, 52 W. Va., 662, 665, 44 S. E., 410.

Hardman vs. Cabot, 60 W. Va., 664, 55 S. E., 756.

By the nature of the business in which they were actually engaged and by their express professions and their practice (*Producers Transp. Co. vs. Railroad Commission*, 251 U. S., 228, 232; *United States vs. Ohio Oil Co.*, 234 U. S., 548, 561), they held themselves out as public-service corporations, supplying, and ready and willing to supply, gas to the public in West Virginia,

and desirous of extending their business in the State (Rec., 1804, 1823, 1843, 1857, 1876, 1896).

They received and hold franchises from municipalities, authorizing the public distribution of gas therein, and franchises or permits in the nature thereof, obtained from municipalities and counties, enabling them to lay and maintain pipe lines and other appliances in the public streets and highways. The details are referred to in the statement.

They have long enjoyed and exercised the right of eminent domain, and in respect of pipe lines an exceptionally expeditious procedure for that exercise. The power of eminent domain, even when not actually called into use, is potentially ever present in aid of the acquisition of rights of way and other property by private contract.

> *Code of W. Va.* (1913), Ch. 42, Secs. 1 and 20; Ch. 52, Sec. 24.
> *W. Va. Acts of 1881,* Ch. 18, Sec. 2.
> *W. Va. Acts of 1891,* Ch. 113.

That these companies would have received the above special rights and privileges except upon the terms of affording adequate service to the public of West Virginia, or in contemplation of the subordination of that service to that of the people of other States, is unthinkable. (See *Western Union Tel. Co. vs. Call Pub. Co.*, 181 U. S., 92, 100; *Postal Cable Tel. Co. vs. Cumberland Tel. & T. Co.*, 177 Fed., 726, 732.)

And yet it is true that the companies transporting the greater part of the West Virginia gas to or for use in other States, their pipe lines and compressor stations,

owe their existence to these special rights and privileges. For as the pipe lines and compressor stations enabled these companies to acquire their own holdings of gas territory, which thereby were withdrawn from acquisition by others, so the pipe lines and stations constitute them, except under special circumstances, the only purchasers from, or market of, the independent producer of gas. And by the pipe lines and stations, which are the only means of transporting the gas to distant points of consumption, these companies are enabled to convey their gas, near or far, to the destination of their choice, within the range of their lines.

Regardless of the law already cited, which in the same breath by which it confers on them the power of eminent domain makes them common carriers (*Code, W. Va.*, Ch. 52, Sec. 24), these companies, as was the case in *United States vs. Ohio Oil Co.*, 234 U. S., 548, refuse to transport for other producers gas which might serve the public in West Virginia. The independent producer must, in general, either stand by and see his gas withdrawn through adjoining operations, or must sell it to one of these companies.

The monopoly thus held by these large companies is described by a short passage from *United States vs. Ohio Oil Co.*, 234 U. S., 548, 559, the language there used in relation to oil being equally applicable to gas:

> "Availing itself of its monopoly of the means of transportation the Standard Oil Company refused, through its subordinates, to carry any oil unless the same was sold to it or to them, and through them to it, on terms more or less dictated by itself. In this way it made itself master of the

fields without the necessity of owning them, and carried across half the continent a great subject of international commerce coming from many owners, but, by the duress of which the Standard Oil Company was master, carrying it all as its own."

And the resulting evil is akin to that referred to by the Hepburn Act of June 29, 1906 (34 U. S. Stat. at L., 584), rendering it illegal for interstate carriers to transport commodities owned by them or in which they were interested. (See *United States vs. Delaware & H. R. Co.*, 213 U. S., 366; *Delaware, L. & W. Co. vs. United States*, 231 U. S., 363.)

Duties of Gas Companies to Serve West Virginia Public.

The duties assumed and undertaken by these corporations have already been referred to. We repeat the following passage from *Carnegie Natural Gas Co. vs. Swiger*, 72 W. Va., 557, 571, 79 S. E., 3:

"We observe that the Legislature, by general law, has conferred upon pipe-line companies, organized for transporting oil and natural gas, the right of eminent domain, and has thereby necessarily imposed upon them, as public-service corporations, the right and duty of performing a public service. That right and duty is fixed as firmly as if written into the statute. * * * Pipe-line companies organized for transporting gas must serve the public with gas, under reasonable and proper regulations, along the entire line traversed, and for reasonable rates fixed by themselves, or by statute, or by contracts

or ordinances of municipalities. * * * The rights of the people are thus protected in nearly every case where the public is served by public service corporations, furnishing water, gas, electricity, or transportation." (Citing *Charleston Gas Co. vs. Lowe*, 52 W. Va., 662; *Hydro-Electric Co. vs. Liston*, 70 W. Va., 83; *Calor Oil & Gas Co. vs. Franzell* (Ky.), 109 S. W., 328; *Olmstead vs. Morris Aqueduct*, 47 N. J. L., 311; *Gibbs vs. Consolidated Gas Co.*, 130 U. S., 396; *Munn vs. Illinois*, 94 U. S., 133.)

In *Western Union Tel. Co. vs. Call Pub. Co.*, 181 U. S., 92, 100, Mr. Justice Brewer said of common carriers:

> "They are endowed by the State with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this, all individuals have equal rights both in respect to services and charges."

In *Gibbs vs. Consolidated Gas Co.*, 130 U. S., 396, quoted in *Charleston Nat. Gas Co. vs. Lowe*, 52 W. Va., 662, 44 S. E., 410; *People vs. Chicago Gas Trust Co.*, 130 Ill., 393, 22 N. E., 803, and in many other cases, it was said:

> "These gas companies entered the streets of Baltimore, under their charters, in the exercise of the equivalent of the power of eminent domain, and are to be held as assuming an obligation to fulfill the public purposes to subserve which they are incorporated."

And see:

Franke vs. Johnstown Fuel Supply Co., 70 Pa. Super. Ct., 446, 457.

Kelley Axe Mfg. Co. vs. Public Service Com., 87 W. Va., 368, 105 S. E., 152.

It thus appears that the right of eminent domain is delimited by, and coincides with, the public use which it is intended to aid. And that public use is shortly expressed in *Hydro-Electric Co. vs. Liston*, 70 W. Va., 83, 91, 73 S. E., 86, where, holding that a foreign corporation, authorized to do business in West Virginia, may enjoy the right of eminent domain, it is said:

> "This gives the right of eminent domain, to be exercised, however, *for the public use of the citizens of West Virginia.*"

In *Kohl vs. United States*, 91 U. S., 367, it was said:

> "The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property *for its own public uses, and not for those of another.*"

And see *Trombley vs. Humphrey*, 18 Wend., 9.

In *Lewis, Em. Dom.* (3 ed.), Sec. 310, it is said:

> "The public use for which property may be taken is a public use within the State from which the power is derived. It seems to be an admitted fact generally, that the power inheres in a State *for domestic uses only, to be exercised for the benefit of its own people,* and cannot be extended merely to promote the public uses of a foreign State."

See also *Grover, &c., Land Co. vs. Lovella, &c., Irr. Co.*, 21 Wyo., 204, 131 Pac., 43, elaborately discussing this point, and 1 *Nichols, Em. Dom.*, Sec. 29.

The duty of serving the public of West Virginia being plain, it follows that the gas companies were and are obligated to furnish that public within the territory of their operations or along their pipe lines a supply of gas, and this apart from the Act of 1919, now in contest.

In *Charleston Nat. Gas Co. vs. Lowe*, 52 W. Va., 662, 671, 44 S. E., 410, it was said:

> "But have the citizens of Charleston an absolute and indefeasible right to the use of the gas upon reasonable and equal terms? Is the company **bound to furnish** gas to all who apply for it without an express legislative imposition of that duty upon it? Undoubtedly. The courts have so held in many of the States, and their decisions are grounded upon both reason and the best of authority."

In *Carnegie Nat. Gas Co. vs. Swiger*, 72 W. Va., 557, 571, 79 S. E., 3, it was stated:

> "Pipe-line companies organized for transporting gas must serve the people with gas, under reasonable and proper regulations, along the entire line traversed, and for reasonable rates fixed by themselves, or by statute, or by contracts or ordinances of municipalities."

See:

Kelley Axe Mfg. Co. vs. Public Service Com., 87 W. Va., 368, 105 S. E., 152.

In *New York vs. McCall*, 245 U. S., 345, 351, Mr. Justice Clarke said:

> "Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve, and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render."

And, as already pointed out, the measure of that supply was and is reasonable adequacy.

> *Russell vs. Sebastian*, 233 U. S., 195, 208;
> *Cumberland Tel. & T. Co. vs. Kelly*, 160 Fed., 316, 324, per Lurton, J.;
> *United States Tel. Co. vs. Central Union Tel. Co.*, 202 Fed., 66. 71;
> *Oklahoma Nat. Gas Co. vs. Oklahoma*, U. S. Adv. Ops. 1921-22, p. 331;
> *Pennsylvania Pub. Service Com. Law*, Art 2, sec. 1 (*Pa. Pub. Laws of 1913*, p. 1374;
> *New York Pub. Service Com. Law*, sec. 65 (Laws of 1910, Ch. 480);
> *Indiana Public Utility Law*, sec. 7 (Acts of 1913, Ch. 76).

It is relevant in this relation, though perhaps unnecessary in view of the professions and practice of the gas companies (*Producers Transp. Co. vs. Railroad Com. of California*, 251 U. S., 228, 232; *United States vs. Ohio Oil Co.*, 234 U. S., 548, 561), both in West Virginia and the plaintiff States, to mention that the

scope of the public duty includes not merely the supply of domestic consumers, but also the furnishing of gas for public buildings and for industrial consumption. This relevancy arises because of the contention of one of the witnesses for the plaintiffs (Rec., 942) that the industrial consumption of gas is wasteful, and the prophecy of other witnesses for the plaintiffs that the enforcement of the statute in question will divert to West Virginia the entire gas production of the State. In the statement of facts it has already been indicated that both by representations of readiness and willingness to supply gas for industrial use, and by their actual engagement in the business of furnishing such gas, these companies have stamped such service as a public service. The industrial consumption occurs in large volumes in the other States, and particularly in Pennsylvania.

Laying aside the professions and practice of the gas companies operating in West Virginia and the other States and apart from the statute now in controversy, it has been held by the highest court of West Virginia that the furnishing of gas for industrial purposes is a public service, and that the business of a gas company in this regard is affected with a public interest.

Clarksburg Light & H. Co. vs. Public Service Com., 84 W. Va., 638; 100 S. E., 551;
Kelly Axe Mfg. Co. vs. Public Service Com. 87 W. Va., 368, 105 S. E., 152.

The same rule prevails in Pennsylvania. In *Shriver vs. Manufacturers Light & Heat Co.*, and *Craig vs. Same*, Complaints Nos. 3563 and 3585, decided June 27,

1921, the Public Service Commission of Pennsylvania held as follows:

> "All service rendered by a natural gas company in Pennsylvania, be it industrial or domestic, comes within the jurisdiction of the Commission, and respondent doing business under the Natural Gas Act of 1885 cannot be permitted, in the manner proposed, to render industrial service by making special contracts without filing rates therefor. A rule of a natural gas company, which limits the amount of gas used for household purposes to 40,000 cubic feet per month, is unjust and unreasonable when it appears that respondent, even in winter months when the limitation would become effective, is rendering much greater service for industrial purposes than to household patrons affected by the rule, and doing this without submitting itself to State control."

Recognition of the public character of the service, though not the subject of direct decision, is to be found in *Pennsylvania Gas Co. vs. Public Service Com.*, 252 U. S., 23, 31. And the same view is contained in principle in the negative answer in *Interstate Commerce Com. vs. Baltimore & O. R. Co.*, 225 U. S., 326, 342, to the inquiry, "May a carrier look beyond the service it is called upon to render to the attitude and interest of the shippers before, or their attitude and interest after, transportation?"

See also:

Hydro Electric Co. vs. Liston, 70 W. Va., 83, 88, 73 S. E., 86.

Mill Creek Coal & C. Co. vs. Public Service Com., 84 W. Va., 662, 100 S. E., 557.

Bailey vs. Fayette Gas Fuel Co., 193 Pa., 175, 44 Atl., 251.

THE GAS BUSINESS AND WEST VIRGINIA GAS ARE AFFECTED WITH A PUBLIC INTEREST.

That the business of a gas company is affected with the public interest, within the meaning of the cases reaching from *Munn vs. Illinois*, 94 U. S., 113, to *Union Dry Goods Co. vs. Georgia Pub. Service Corp.*, 248 U. S., 372, 374, 375, is commonplace.

Charleston Gas Co. vs. Lowe, 52 W. Va., 662, 671, 44 S. E., 410.

Clarksburg Light & H. Co. vs. Public Service Com., 84 W. Va., 638, 100 S. E., 551.

Franke vs. Johnstown Fuel Supply Co., 70 Pa., Super. Ct., 446, 456.

Pennsylvania Gas Co. vs. Public Service Com., 252 U. S., 23.

Manufacturers Light & H. Co. vs. Ott, 215 Fed., 940.

But we may justifiably go further. Given a commodity of peculiar attributes, local in its origin, exhaustible, and, in fact, approaching the point of exhaustion, as is West Virginia gas, so that on the one hand it has become a public necessity at home and is, or may be, insufficient both to supply that necessity and to furnish it to consumers abroad, in the hands of corporations owing public duties, in the performance of which the public has an interest, *the gas itself is in a just sense to be regarded as affected by a public interest.*

In *German Alliance Ins. Co. vs. Lewis*, 233 U. S., 389, it was held that even the making of personal contracts, such as contracts of fire insurance, might be affected by the public interest. Mr. Justice McKenna there said in reply to the suggestion that only tangible property could be so affected:

> "The distinction is artificial. It is, indeed, but the assertion that the cited examples embrace all cases of public interest. The complainant explicitly so contends, urging that the test it applies excludes the idea that there can be a public interest which gives the power of regulation as distinct from a public use, which, necessarily, it is contended, can only apply to property, not to personal contracts. The distinction, we think, has no basis in principle (*Noble State Bank vs. Haskell*, 219 U. S., 104), nor has the other contention that the service which cannot be demanded cannot be regulated."

In *Wilson vs. New*, 243 U. S., 332, it was held that the personal services of the employees of interstate railroads were so far affected with a public interest as to justify the regulation of hours of labor and in consequence a wage standard.

That the public interest may extend to property itself, as distinguished from a business, considered merely as an institution, is illustrated by the instance of the grain elevators in *Munn vs. Illinois*, 94 U. S., 113. The same idea is conveyed in *Union Dry Goods Co. vs. Georgia Pub. Service Com.*, 248 U. S., 372, 374, where it was said "that capital invested in an electric light and power plant to supply electricity to the inhabitants of a city is devoted to a use in which the public has an

interest." In *Block vs. Hirsh*, 256 U. S., 135, involving the District of Columbia rent law, cases were cited as sustaining the point "that the public interest may extend to the use of land."

In *Franke vs. Johnstown Fuel Supply Co.*, 70 Pa. Super. Ct., 446, 456, this view is expressed as follows:

> "What the company did was from the beginning subject to the conditions under which it existed at all. The public had no interest in, or right to, the gas of the promoters of the Peoples Natural Gas Company until the latter, for the purpose of obtaining the advantages accorded to them under the statute, organized their company. The owners were not compelled to give to the public an interest in their supply of gas, but they became under obligation to the laws of the commonwealth if they used it in the manner prescribed by that law. When the shareholders accepted the charter of the company and proceeded to exercise the franchises thereby granted they invested the public or such limited portion of the public with a use or right of use in the commodity which they supplied. This constitutes a public use—such a use as might have been in the contemplation of the parties when the company was organized."

See also *Bacon vs. Walker*, 204 U. S., 311, 315.

And in *Walls vs. Midland Carbon Co.*, 254 U. S., 300, regulating the consumption of gas in carbon-black manufacture, it was referred to as "a determining consideration" that the State had "an interest to adjust

and preserve, natural gas being one of the resources of the State."

We need not go so far as to say that the whole quantity of gas existing in a State at any time is affected by the public interest; for if there is an abundance wherewith to serve all present requirements, it may well be that the public cannot be said to have an interest in any particular part of it. But if the whole quantity of gas is so far reduced, or in prospect of reduction, that all who at the time desire to consume it cannot be served, and the very gas which is being produced by corporations, themselves affected by the public interest, is immediately necessary for consumption by the people of the State, that very gas may in a correct sense be deemed to be affected with the public interest of the State, and to fall within a different rule. For as said in *Block vs. Hirsh, supra*: "Plainly, circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern;" and then referring to previous decisions it was remarked: "They dispel the notion that what in its immediate aspect may be only a private transaction may not be raised by its class or character to a public affair."

Walls vs. Midland Carbon Co., supra, is, indeed, an example of these observations in *Block vs. Hirsh*; for the *Walls Case* related to a failing gas supply, in respect of which it was said:

> "The determining consideration is the power of the State over, and its regulation of, a property in which others besides the companies may have rights, and in which the State has an interest to ad-

> just and preserve, natural gas being one of the resources of the State."

And again it was said of previous cases that,—

> "the State of Wyoming has the same power to prevent the use of natural gas in the production of carbon black, the tendency of which is (it may be the inevitable effect of which is) the exhaustion of the supply of natural gas, and the consequent detriment of other uses."

These considerations would, we believe, sufficiently distinguish *West vs. Kansas Nat. Gas Co.*, 221 U. S., 229, even if the legislation now in contest directly acted on interstate commerce. There the whole volume of gas produced in Oklahoma was more than sufficient to serve the then gas-consuming public of that State, and only the surplus, required by no present necessity in the State, was being transported out of it. Still further, the companies and individuals attacking the validity of the statute there involved were, as more fully appears in the report of the case below (*Kansas Nat. Gas Co. vs. Haskell*, 172 Fed., 545), not engaged, and apparently not obligated to engage, in the public supply of gas in Oklahoma. Therefore, neither they by their business, nor their surplus product, by any existing need, could be said to be affected by any immediate public use. We shall refer to this decision again, in relation to the commerce clause of the Federal Constitution.

Lack of Power of Gas Companies to Disable Themselves From Performing Public Duty.

The duty of serving the public of West Virginia appearing, upon no pretext, (even though, as we shall point out later, it were the desire to engage in interstate commerce—*Hudson County Water Co. vs. McCarter,* 209 U. S., 348; *Erie R. Co. vs. Board of Public Com.,* 254 U. S., 394; *South Covington & C. S. R. Co. vs. Kentucky,* 252 U. S., 399, 403; *Browning vs. Waycross,* 233 U. S., 16, 23; *Manufacturers Light & H. Co. vs. Ott,* 215 Fed., 940, 951), could or can these companies renounce or abandon the duty of furnishing gas to that public to the extent of their ability to do so, within the measure of reasonable adequacy and the territorial limits prescribed by law. In *Gibbs vs. Consolidated Gas Co.,* 130 U. S., 396, Mr. Chief Justice Fuller said:

> "It is also too well settled to admit of doubt that a corporation cannot disable itself by contract from performing the public duties which it has undertaken, and by agreement compel itself to make public accommodation or convenience subservient to its private interests.
>
> " 'Where,' says Mr. Justice Miller, delivering the opinion of the court in *Thomas vs. Railroad Co.,* 101 U. S., 71, 83, 'a corporation, like a railroad company, has granted to it a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes without the consent of the State to transfer to others the rights and powers conferred by the charter, and to relieve the grantees

of the burden which it imposes, is a violation of the contract with the State and is void as against public policy.'

"These gas companies entered the streets of Baltimore, under their charters, in the exercise of the equivalent of the power of eminent domain, and are to be held as having assumed an obligation to fulfill the public purposes to subserve which they are incorporated."

In *Attorney-General vs. Haverhill Gas L. Co.*, 215 Mass., 394; 101 N. E., 1061, it was said of the gas company:

"The respondent is a corporation, organized to exercise a public franchise of importance to the community in which it conducts its business. It is its duty to exercise this franchise for the benefit of the public, with a reasonable regard for the rights of individuals who desire to be served, and without discrimination between them. It cannot relieve itself from this duty so long as it retains its charter. It enjoys public rights in the streets, which are derived from the Commonwealth, through action of the board of aldermen under authority of the Legislature. It is a quasi-public corporation, and as such it owes duties to the public. * * * Without legislative authority it cannot sell its property and franchise to another party, in such a way as to take away its power to perform its public duties."

See also:

Oregon R. & N. Co. vs. Oregonian R. Co., 130 U. S., 1, 23;

Central Transp. Co. vs. Pullman P. C. Co., 139 U. S., 24, 42-44;

South Covington & C. S. R. Co. vs. Kentucky, 252 U. S., 399, 403, 404;

Visalia Gas & El. Co. vs. Sims, 104 Cal., 326; 37 Pac., 1044;

Charleston Nat. Gas Co. vs. Lowe, 52 W. Va., 622, 671; 44 S. E., 410;

Town of Gassaway vs. Gassaway Gas Co., 75 W. Va., 60; 83 S. E., 189.

The principle of the foregoing authorities is applicable. Instead of disposing of their plants, as has been often attempted, the seven gas companies have attempted to disable themselves from the performance of their duty of serving the people of West Virginia by disposing elsewhere of the very subject matter of the service. The disability equally exists, and would be no greater if they sold their pipe-lines, or the entire body of their gas territory.

VI.

IT WAS WITHIN THE RIGHT AND POWER OF THE STATE TO REGULATE THE GAS COMPANIES. THE RIGHT AND POWER ARE BASED ON SEVERAL GROUNDS AND THEIR EXERCISE WAS NECESSARY.

The nature of the gas companies and the relation of their service to the West Virginia public having been adverted to, the legislative right of the State to regulate them, in order to compel the performance of their duties, is manifest and well established. That right, and its due expression, rest upon a triple foundation:

(1) *The Implied Condition Accompanying the Grant of Rights and Privileges to the Companies.*

The implied condition of public service accompanied the grant of the corporate powers and special rights and privileges, and subject to such condition those powers, rights and privileges were accepted by these companies.

Charleston Gas Co. vs. Lowe, 52 W. Va., 662, 671; 44 S. E., 410;

Carnegie Nat. Gas Co. vs. Swiger, 72 W. Va., 557, 571; 79 S. E., 3;

Farmers Loan & T. Co. vs. Galesburg, 133 U. S., 156;

Lake Shore & M. S. R. Co. vs. Ohio, 173 U. S., 285;

New Orleans Waterworks Co. vs. Louisiana, 185 U. S., 336, 346;

Missouri P. R. Co. vs. Kansas, 216 U. S., 262;

Chesapeake & O. R. Co. vs. Public Service Com., 242 U. S., 603, 607;

New York El. L. Co. vs. Empire City S. Co., 235 U. S., 179, 194, 195.

In *Lake Shore & M. S. R. Co. vs. Ohio, supra*, it was said:

> "The plaintiff in error accepted its charter subject necessarily to the condition that it would conform to such reasonable regulations as the State might from time to time establish, that were not in violation of the supreme law of the land."

In *Missouri P. R. Co. vs. Kansas, supra,* in upholding the validity of an order of a State Railroad Commission requiring an interstate railroad to operate an additional train within the State, it was said, quoting in part from *Atlantic Coast Line R. Co. vs. North Carolina Corp. Com.*, 206 U. S., 1:

> "But where a duty which a corporation is obliged to render is a necessary consequence of the acceptance and continued enjoyment of its corporate rights, those rights not having been surrendered by the corporation, other considerations are, in the nature of things, paramount, since it cannot be said that an order compelling the performance of such a duty at a pecuniary loss is unreasonable. To conclude to the contrary would be but to declare that a corporate charter was purely unilateral; that is, was binding in favor of the corporation as to all rights conferred upon it, and was devoid of obligation as to duties imposed, even although such duties were the absolute correlative of the rights conferred."

(2) *The Reserved Power to Alter or Repeal Corporation Charters and Laws.*

The Legislature at the outset had the power to impose such conditions as it saw fit upon the grant of corporate charters, franchises, rights of condemnation and other privileges to gas companies.

Ashley vs. Ryan, 153 U. S., 436, 441-444;
Home Ins. Co. vs. New York, 134 U. S., 594, 600;
New Jersey vs. Anderson, 203 U. S., 483, 493.

In authorizing the incorporation of such companies, or such rights and privileges, the Legislature might, in the public interest, have imposed as conditions every provision of the statute assailed. And a corporation accepting a charter upon such conditions would have been estopped to rebel against them.

Ashley vs. Ryan, 153 U. S., 436, 441, 443;
Interstate Consol. S. R. Co. vs. Massachusetts, 207, U. S., 79, 84.

If at the outset West Virginia, in consideration of the exhaustible nature of the commodity, and the local character of the public gas supply (*Pennsylvania Gas Co. vs. Public Service Com.*, 252 U. S., 23; *Public Utilities Com. vs. Landon*, 249 U. S., 236), had by express enactment imposed on corporations, or even individuals as a condition of permission to engage in the public service in West Virginia, or some municipality thereof, that they should sell gas only in or for the State or the particular municipality, we submit that nothing would have forbade the condition.

When the gas companies were incorporated or admitted to do business in West Virginia, and ever since,

it has been within the reserved power of the Legislature "to alter the charter or certificate of incorporation * * * granted to any joint-stock company, and to alter or repeal any law applicable to such company."

Code of W. Va., Ch. 53, Sec. 8;
W. Va. Acts of 1867, Ch. 5, Sec. 6;
W. Va. Acts of 1882, Ch. 96, Sec. 8;
St. Mary's, &c., Petroleum Co. vs. West Virginia, 203 U. S., 183;
Manufacturers Light & H. Co. vs. Ott, 215 Fed., 940.

This being true, when the Legislature enacted the statute in question it was equally within its power to prescribe that they should render reasonably adequate service to West Virginia, and to provide for the supply of local companies experiencing a shortage, to the extent which the present statute contemplates.

Stanislaus Co. vs. San Joaquin & K. R. & I. Co., 192 U. S., 201, 211;
Erie R. Co. vs. Williams, 233 U. S., 685, 700-704;
Sutton vs. New Jersey, 244 U. S., 258, 260;
Fair Haven & W. R. Co. vs. New Haven, 203 U. S., 379, 288;
San Antonio T. Co. vs. Altgelt, 200 U. S., 304;
New York & N. E. R. Co. vs. Bristol, 151 U. S., 556, 567, 568;
Hamilton Gaslight & C. Co. vs. Hammond, 146 U. S., 258, 269-271;
Spring Valley Water Co. vs. Schottler, 110 U. S., 347, 353;
Greenwood vs. Union Freight Co., 105 U. S., 13;

Hammond Packing Co. vs. Arkansas, 212 U. S., 322, 345, 346.

(3) *The Police Power.*

The general police power, apart from any implication of conditions annexed to the grant, embraces the settled right of the State to compel its creatures to perform the public duties for which they were created.

Munn vs. Illinois, 94 U. S., 113;
New Orleans Gas L. Co. vs. Louisiana Light, &c. Co., 115 U. S., 650;
Stone vs. Farmers L. & T. Co., 116 U. S., 307;
Reagan vs. Farmers L. & T. Co., 154 U. S., 362;
Prentis vs. Atlantic Coast Line Co., 211 U. S., 210;
Erie Railroad Co. vs. Board of Public Utility Com., 254 U. S., 394;
United Fuel Gas Co. vs. Public Service Commission, 73 W. Va., 571, 80 S. E., 931;
Mill Creek Coal & C. Co. vs. Public Service Com., 84 W. Va., 662; 100 S. E., 557.

VII.

THE STATUTE IS A LEGITIMATE EXERCISE OF THE POLICE POWER.

Were these provisions a legitimate exercise of the power of the State? The question must be answered in the light of the known characteristics of gas production and its originally inevitable and present decline in West Virginia ~~and elsewhere~~; the nature of the gas companies as public-service corporations; the relation of the public interest to their business and gas; the absorption by the seven companies of other West Virginia companies; the gas shortage and its effects in West Virginia; the inability of local companies to supply the deficiency, because of the control by the seven companies of gas and gas territory, obtained through the possession of large capital, pipe lines owing their existence to special rights and privileges, and the compressor stations (*1 Wyman, Public Service Corp.*, Sec. 91); the conditions attaching to the enjoyment of such special rights and privileges; the reserved statutory power to alter or repeal charters and laws affecting corporations, and the nature and purposes of the police power.

From the social and economic dependency on gas in reasonably adequate volume, the domestic and industrial evils resulting from the lack of such service, and the "fact accomplished" that there is now, and for several years has been, insufficient West Virginia gas to permit at once the full measure of service in West Virginia and the other States to which it was and is transported, admittedly there must be, in the nature of things, a limitation upon the service and consumption of gas,

in respect of either the purposes of the consumption or the territorial area of supply. This much is admitted by all the witnesses for the plaintiffs, as we have shown in the statement of facts, and in the reference, under Title IV, to the construction of the statute.

In this situation, it was and is incumbent on some one to formulate and enforce suitable regulations. And the Congress not having acted, even in respect of the interstate transportation of gas (*Act of June 18, 1910*, Ch. 309, Sec. 7; 36 Stat. at L., 539, 544; *Pennsylvania Gas Co. vs. Public Service Com.*, 252 U. S., 23, 30), the exercise of a regulatory power must emanate either from the State or from the gas companies. And the question is, which should it be?

But we have also shown that the managing officers of six out of the seven gas companies, and others experienced in the gas business or thrust forward as experts, and appearing as witnesses for the plaintiffs, are submerged in perplexity and disagree as to the appropriate remedy, agreeing only that West Virginia gas is declining and that West Virginia consumers are getting too great a share of it. The reasonable anticipation, if regulation were to be left to the gas companies, is accurately gauged by the denial of West Virginia's regulatory power, if and when its regulations affect the quantity of gas transported to the other States, regardless of consequences in and to West Virginia; by the insistence upon peak load requirements in time of shortage (Rec. 697); by the predictions of injury to the other States and gas companies therein, through the withdrawal of any West Virginia gas from export (Rec., 526, 605, 606, 854, 972, 973), and by the thought expressed by some

witnesses for the plaintiffs, already quoted, that, irrespective of the statute, any increased consumption in West Virginia, even because of increased population, would prejudice the other States (Rec., 854, 972, 973).

In the diversity of opinion of specialists, mainly effective to "darken counsel," we think that by the process of elimination, if nothing more—aside from the aspect of legislative power and duty—it necessarily fell to the State of West Virginia to enact fitting regulations. And the only question is, whether it had the power, and whether that power has been exercised within the limits of legislative discretion.

Under Title IV we have discussed the construction of the statute and its reasonableness. And we approach the question of power.

POLICE POWER AS TO THE GENERAL SUBJECT.

In *Ohio Oil Co. vs. Indiana,* 177 U. S., 190, legislation to prevent wasteful escape of gas from wells was upheld, in view of the peculiar nature of gas and the right of the State to "consider the relation of rights, and accommodate their co-existence, and, in the interest of the community, limit one that others may be enjoyed" (*Walls vs. Midland Carbon Co.,* 254 U. S., 300).

In *Lindsley vs. Nat. Carbonic Gas Co.,* 220 U. S., 61, relating to a statute prohibiting the pumping of mineral waters for the extraction of carbonic-acid gas, or the production of the unnatural flow of such gas, for commercial purposes otherwise than in conjunction with the mineral waters, it was said of *Ohio Oil Co. vs. Indiana,*

"were the question an open one, we should still solve it in the same way."

More recently, in *Walls vs. Midland Carbon Co.*, 254 U. S., 300, it was held that in order to conserve gas, shown to be declining in certain fields where, or in the vicinity of which it was needed for more economical consumption, the State of Wyoming could constitutionally restrict the use of gas for carbon-black manufacture. And it was said, after citing *Ohio Oil Co. vs. Indiana* and *Lindsley vs. Nat. Carbonic Gas Co.*:

> "By reverting to these cases it will be immediately observed that the power of regulation over natural gas is possessed by a State, and in the first case (*Ohio Oil Co. vs. Indiana*) it was exercised to prohibit the employment of the gas as a means or agency in the production of oil against an asserted right of property in the ownership of the land upon which the oil was produced, and, therefore, of the oil and gas as incidents of such ownership, and which could be used in such manner and quantity as the land owner might choose."

And in respect of the State's power to protect and preserve gas as a natural resource, it was remarked:

> "And there is great disproportion between the gas and the product, and necessarily there was presented to the judgment and policy of the State a comparison of utilities which involved as well the preservation of the natural resources of the State and the equal participation in them by the people of the State. And the duration of this utility was for the consideration of the State, and we do not think that the State was required by the Constitu-

tion of the United States to stand idly by while these resources were disproportionately used, or used in such way that tended to their depletion, having no power of interference.

The cited cases determine otherwise; and that, as the State of Indiana could prevent the exhaustive use of gas in the production of oil, and as the State of New York could prevent the owner of land from using artificial means to obtain the carbonated waters under his land, the State of Wyoming has the same power to prevent the use of natural gas in the production of carbon black, the tendency of which is (it may be the inevitable effect of which is) the exhaustion of the supply of natural gas, and the consequent detriment of other uses."

Apart from the cases dealing especially with gas, and the particular considerations affecting public-service corporations, the more general authorities dealing with the police power fortify their principles and their application to the cases now at bar.

Of the police power it has been said it is—

"One of the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government.' '

District of Columbia vs. Brooke, 214 U. S., 138, 149;
Eubank vs. Richmond, 226 U. S., 137, 142;
Sligh vs. Kirkwood, 237 U. S., 50, 59;
Hall vs. Geiger-Jones Co., 242 U. S., 539.

And, as said in *Chicago & A. R. Co. vs. Tranbarger,* 238 U. S., 66, 77:

"This power can neither be abdicated nor bar-

gained away, and is inalienable even by express grant; and * * * all contract and property rights are held to its fair exercise. *Atlantic Coast Line R. Co. vs. Goldsboro,* 232 U. S., 548, 558, and cases cited."

The public welfare to which the protection of the power extends, embraces not only public health, morals, and safety, but also the public convenience and the general prosperity.

Chicago, B. & Q. R. Co. vs. Illinois, 200 U. S., 561, 592;
Bacon vs. Walker, 204 U. S., 311, 317;
Eubank vs. Richmond, 226 U. S., 137, 142;
Sligh vs. Kirkwood, 237 U. S., 52, 59;
Chicago & A. R. Co. vs. Tranbarger, 238 U. S., 66, 77.

In *Sligh vs. Kirkwood, supra,* it was said:

"It is not subject to definite limitations, but is co-extensive with the necessities of the case and the safeguards of public interest. *Canfield vs.* United States, 167 U. S., 518, 524. It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health. *Chicago, B. & Q. R. Co. vs. Illinois,* 200 U. S., 561, 592. In one of the latest utterances of this court upon the subject, it was said: 'Whether it is a valid exercise of the police power is the question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It ex-

tends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity.' * * * And, further: 'It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government.' *Eubank vs. Richmond,* 226 U. S., 137."

The scope of this power, and its flexibility in meeting and dealing with modern conditions, are illustrated in *German Alliance Insurance Co. vs. Lewis,* 233 U. S., 389, where State regulation of fire-insurance rates was upheld, and, again, *Hall vs. Geiger-Jones,* 242 U. S., 539; *Caldwell vs. Sioux Falls Stockyards Co.,* 242 U. S., 599, and *Merrick vs. Halsey,* 242 U. S., 568, upholding the "Blue Sky laws." In *Merrick vs. Halsey,* Mr. Justice McKenna said:

"Every new regulation of business or conduct meets challenge, and, of course, must sustain itself against challenge and the limitations that the Constitution imposes. But it is to be borne in mind that the policy of a State and its expression in laws must vary with circumstances. And this capacity for growth, and adaptation we said, through Mr. Justice Matthews, in *Hurtado vs. California,* 110 U. S., 516, 530, is the 'peculiar boast and excellence of the common law.' It may be that constitutional law must have a more fixed quality than customary law, or, as was said by Mr. Justice Brewer in *Muller vs. Oregon,* 208 U. S., 412 420, that 'it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action.' This, however, does not mean that the form is so

rigid as to make government inadequate to the changing conditions of life, preventing its exertion, except by amendments to the organic law."

The application of the police power to the protection of the public health, as in the prevention of the adulteration of food (*Plumley vs. Massachusetts*, 155 U. S., 461; *Capital City Dairy Co. vs. Ohio*, 183 U. S., 238; *Price vs. Illinois*, 238 U. S., 446); or the limitation of the hours of labor (*Muller vs. Oregon*, 208 U. S., 412; *Miller vs. Wilson*, 236 U. S., 373; *Holden vs. Hardy*, 169 U. S., 366), are commonplace.

Measures to safeguard the business prosperity of the State are exampled by the prohibition of monopolies and combinations in restraint of trade (*Waters-Pierce Oil Co. vs. Texas*, 212 U. S., 86; *Grenada Lumber Co. vs. Mississippi*, 217 U. S., 433; *Standard Oil Co. vs. Missouri*, 224 U. S., 270; *International Harvest. Co. vs. Kentucky*, 234 U. S., 199); of unfair competition (*Central Lumber Co. vs. South Dakota*, 226 U. S., 157), and of the sale or shipment of products detrimental to the business reputation of an important industry (*Sligh vs. Kirkwood*, 237 U. S., 50).

If it be true that in any instance the State may legislate in the interest of the health and general business prosperity of its inhabitants, it must follow that health may be preserved against injury by cold as well as by disease or adulteration of food, and that the industry of the State may be protected as well from destruction by deprivation of necessary fuel as from mere injury by practices hurtful to its trade or reputation. Upon this ground, aside from any peculiar relations or obligations

affecting public-service corporations, it is plain that the State may legislate in defense of its people and its industries in prevention of a real and present danger arising from deprivation of gas.

Nor is it an answer that the State did not interpose earlier. While the gas supply was adequate there was no occasion for the exertion of the State's power. And regardless of this, the delay did not detract from the power. In *German-Alliance Ins. Co. vs. Lewis*, 233 U. S., 389, 416, Mr. Justice McKenna, in upholding an exercise of the police power, said by way of illustration drawn from the enactment of the Interstate Act a century after the power to regulate commerce was created:

> "It was exerted only when the size, number and influence of those agencies had so increased and developed as to seem to make it imperative. Other illustrations readily occur which repel the intimation that the inactivity of a power, however prolonged, militates against its legality when exercised. *United States ex rel. Atty.-Gen. vs. Delaware & H. Co.*, 213 U. S., 366. It is oftener the existence of necessity rather than the prescience of it which dictates legislation."

And in *Thornton vs. Duffy*, 254 U. S., 361, 369, it was said that,—

> "An exercise of public policy cannot be resisted because of conduct or contracts done or made upon the faith of former exercises of it, upon the ground that its later exercises deprive of property or invalidate those contracts. *Louisville & N. R. Co. vs. Motley*, 219 U. S., 467."

Industrial Use of Gas.

We do not understand it to be contended seriously that the enforcement of the statute in respect of domestic users would materially add to the volume of West Virginia gas consumption (Rec., 972).

We anticipate, however, special reference on the other side to two features of the statute: (1) the provision made for industrial gas supply and (2) the provision made for the sale of gas to other gas companies not themselves possessed of a reasonably adequate supply.

In regard to the objection to the requirement of a reasonably adequate supply for industrial use, several answers at once appear. They have already been stated in the reference to industrial gas in the statement of facts, and under Title IV, subdivision (d), and under Title V, "*Duties of Gas Companies to Serve West Virginia Public.*"

Assuming, as we have already shown, that the supply of industrial gas is, by the holding out by the gas companies of their readiness and willingness to furnish such gas (subject only to the needs of domestic consumers) and by the settled law of West Virginia, a public service (*Clarksburg Light & H. Co. vs. Public Service Com.*, 84 W. Va., 638, 100 S. E., 551; *Kelley Axe Mfg. Co. vs. Public Service Com.*, 87 W. Va., 105, S. E., 152; *Mill Creek Coal & C. Co. vs. Public Service Com.*, 84 W. Va., 662, 100 S. E., 557), there is no distinction in principle between that service and the domestic service. Between the supply of gas for domestic

purposes and for industrial use there is but one difference. The service differs only in degree of necessity because the hardship is personally more acute in case of failure of the domestic supply than where the failure pertains to the industrial supply. This, of course, constitutes a sufficient basis for classification, preferential to the domestic consumer. But the fact that classification may be justified, proves nothing in regard to the nature of the subordinate service. The latter is still a public service.

The plaintiffs disagree with the policy of West Virginia in denominating the industrial service as public and in requiring its fulfillment, though they inconsistently permit industrial use within their own confines —even of West Virginia gas—and the gas companies in general emphasize the necessity of such use. We pursue this no further, because, however the plaintiffs may disagree, the uses to which gas may be applied in West Virginia was and is a local question for the determination of the Legislature of that State; and the objections of the plaintiffs go, as said in *Ohio Oil Co. vs. Indiana,* 177 U. S., 190, 211, "not to the power to make the regulations, but to their wisdom," and "with the lawful discretion of the legislature of the State" there can be no judicial interference.

And see:

Lindsley vs. Nat. Carbonic Gas Co., 220 U. S., 61, 76, 77;

Walls vs. Midland Carbon Co., 254 U. S., 300.

As to the dismal foreboding, the asertion that the enforcement of the statute as to ind'strial consumers

will absorb all the West Virginia gas, it may be sufficient to remark that these are wholly speculative, and "mere prophecies which are ventured" (*Tanner vs. Little,* 240 U. S., 369, 385).

The provisions of Section 4 and the correlation of the Public Service Commission Act, by appropriate administrative hearing and determination, with judicial review, effectually guard against the requirement by the consumer, domestic or industrial, of more than a reasonably adequate supply. If a decision of the Commission as to reasonable adequacy, in respect of either volume or economy of consumption, is deemed erroneous, the gas companies will have their day in court. Such questions can be answered "when they arise" (*Noble State Bank vs. Haskell,* 219 U. S., 104, 112). This Court is not called upon to sit in "anticipatory judgment" (*Tanner vs. Little,* 240 U. S., 369, 385).

But in this day the mantle of prophecy ordinarily yields to probabilities based on known facts. The industrial changes as to fuel which have taken place in West Virginia, as a result of the gas shortage, and the constantly increasing rates, competing unfavorably with producer gas (Rec., 1229-1230), afford subtsantial evidence to this Court, as they may well have done to the Legislature, that no such result would happen.

Still further, in this relation, the presumption being in favor of the validity of the statute and the burden being on the plaintiffs to show a violation of constitutional guaranties, there can be no declaration of unconstitutionality upon mere loose opinion or conjecture. The repeated refusal to declare public-service rates confiscatory in advance of actual test, is illustrative.

Knoxville vs. Knoxville Water Co., 212 U. S., 1, 18, 19;

Willcox vs. Consolidated Gas Co., 212 U. S., 19, 54;

Northern Pacific R. Co. vs. North Dakota, 216 U. S., 579; 236 U. S., 585;

Des Moines Gas Co. vs. Des Moines, 238 U. S., 153, 173;

Missouri vs. Chicago, B. & Q. R. Co., 241 U. S., 533, 539, 540.

SUPPLY OF GAS TO LOCAL COMPANIES.

What has been said as to industrial consumption, applies still more fully to Section 2 of the statute relative to the supply in amounts to be fixed by the Commission of deficits to gas companies having a shortage, when the supplying company has gas in excess of the amount necessary for the reasonably adequate supply of its own consumers in the State, and providing for physical connection of lines after due hearing, and the fixing of reasonable terms, conditions and rates; to which is added the proviso that the company having the surplus may itself, in the alternative, furnish the consumers within the territory a reasonably adequate supply.

It is shown by the proofs that the supply of gas to local companies having a deficit, is precisely what has been done by most of the seven companies in the past (Rec., 1034-1026), what in the present they do among themselves (Rec., 1712, 1769, 1780, 1791), and what they do, and desire to do, in respect of companies out of the State (Rec., 1509, 1524, 1544, 1554, 1560, 1729, 1738, 1745, 1752, 1761). It is shown also that the

shortage of the West Virginia local companies is due in large measure to the control, amounting to a virtual monopoly, of the West Virginia gas supply and fields, acquired in their character as West Virginia public-service corporations obligated to serve the public of that State. We have referred to this in the statement of facts and under Title IV.

There is no savor of constitutional infringement, nor unreasonableness, in requiring the companies to perform acts of the precise character habitually performed by them in the past, nor in enacting that they shall, in the alternative, supply, either directly or indirectly through local companies, consumers whom the companies were legally compellable to supply in advance of the passage of the statute.

The rule against discrimination in itself amply justifies the requirement that a public-service gas company which "wholesales" gas to another company, shall equally supply it to other companies.

People ex rel. Western Union Tel. Co. vs. Public Service Com., 230 N. Y., 95, 129 N. E., 220;

North Carolina Pub. Service Co. vs. Southern Power Co., 282 Fed., 837, 844;

Louisville & N. R. Co. vs. United States, 238 U. S., 1;

Postal Cable Tel. Co. vs. Cumberland Tel. & T. Co., 177 Fed., 726.

The requirement by the State, in the exercise of the police power, of co-operation in the public interest, among persons or corporations engaged in business, is

no new thing in the law. *Noble State Bank vs. Haskell,* 219 U. S., 104, 110, 112, sustaining a statute establishing a depositors' guaranty fund by the involuntary contributions of banks, is an example. There it was said "that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use." The Workmen's Compensation Acts are an added illustration (*New York Central R. Co. vs. White,* 243 U. S., 188; *Mountain Tie & T. Co. vs. Washington,* 243 U. S., 219).

The alternative compulsion of physical connections with local companies having a deficit is no different from the common requirement of physical connections or interchange of facilities in the case of railroads and other public utilities.

W. Va. Acts of 1913, Ch. 9, Sec. 8;
W. Va. Acts of 1915, Ch. 8, Sec. 24;
Ohio General Code, Secs. 522, 614-63;
Pennsylvania Pub. Laws of 1913, p. 1374, *Pub. Service Com. Law,* Art. I, Sec. 1.

Such connections already exist in many instances (Rec., 1034-1036; 1736 at pp. 402-414).

The validity of such requirements has often been sustained.

Wisconsin, M. & P. R. Co. vs. Jacobson, 179 U. S., 287;
Grand Trunk R. Co. vs. Michigan R. Com., 231 U. S., 457, 468;
Chicago, M. & St. P. R. Co. vs. Iowa, 233 U. S., 334;

Pacific Teleph. & Teleg. Co. vs. Wright-Dickinson H. Co., 214 Fed., 666;
Pioneer Teleph. & Teleg. Co. vs. State, 38 Okla., 554; 134 Pac., 398;
Hooper Teleph. Co. vs. Nebraska Teleph. Co., 96 Neb., 245; 147 N. W., 674.

VIII.

THE PLAINTIFFS CLAIM THROUGH THE GAS COMPANIES, AND HAVE NO HIGHER RIGHT OR TITLE TO RELIEF.

Various clauses of the Federal Constitution are invoked by the plaintiffs, as invalidating the statute. Much was said in the bills and evidence, and doubtless more will be said, as to the property, rights, and contracts of the gas companies, and losses from the predicted uselessness of pipe lines leading to, and distributing plants located within, the other States, and the inability of the gas companies to perform their contracts and to supply West Virginia gas to or in the other States.

As to the gas companies, and especially the seven companies operating in West Virginia, as well as the citizens of the plaintiff States, a short answer may be made. If the statute unconstitutionally injures them in property or contract rights, that would not entitle the plaintiffs to complain, "since it is a well-settled rule of this Court that it only hears objections to the constitutionality of laws from those who are affected by its alleged unconstitutionality in the features complained of." "The plaintiffs must show that their own rights are infringed."

Jeffery Mfg. Co. vs. Blagg, 235 U. S., 571, 576;
New York Central R. Co. vs. White, 243 U. S., 188, 199;
Plymouth Coal Co. vs. Pennsylvania, 232 U. S., 531, 545;
Arkadelphia Mill. Co. vs. St. Louis S. W. R. Co., 249 U. S., 134, 149.

Before passing to particular consideration, one general observation is applicable. The alleged rights claimed by the plaintiffs for themselves and their inhabitants are alleged rights to West Virginia gas, derived and derivable, directly or remotely, through gas companies, public-service corporations of West Virginia, obligated from the beginning to serve the public of that State, subject to that primary duty of public service, and from the outset amenable to the laws of the State. And thus mediately deriving their alleged rights, the rights of the plaintiffs can rise no higher than those of the gas companies, and the wrongs complained of are in reality alleged wrongs to the companies, which, if non-existent, leave the plaintiffs with cases of *damnum absque injuria*.

But still further, insofar as the plaintiffs receive gas from gas companies of their own State, who purchase their supplies from the West Virginia companies, they are in worse case. We have already shown that in the majority of instances the West Virginia companies transporting through pipe lines gas to or for consumption in other States, have by their express contracts agreed to furnish gas for the other States only to the extent of their supply (Rec., 1509, 1524, 1544, 1712, 1738, 1745, 1769, 1780), that in some of the contracts West

Virginia domestic consumption is abstractly given a preference (Rec., 1509, 1524, 1544, 1712, 1738, 1745, 1769, 1780), and that in some instances, notably the Hope Natural Gas Company and United Fuel Gas Company, the contracts provide for apportionment or priority of supply as among the purchasing companies (Rec., 1560, 1565, 1738, 1752), so that by the contracts themselves in time of shortage, whether periodic or in the ultimately permanent condition, some companies in the plaintiff States may be supplied, while others are cut off.

Let it be supposed that in time of shortage the territory served by the East Ohio Gas Company receives insufficient gas from the Hope Natural Gas Company, due to the apportionment with the Peoples Natural Gas Company, contemplated by their contracts (Rec., 1544, 1524). Will Ohio, or its inhabitants affected, have cause for complaint or a legal remedy against the Hope Natural Gas Company, or the Peoples Natural Gas Company; or against the State of Pennsylvania, because the laws of that State require its gas companies to give reasonably adequate service? Or will there be a right or remedy against the United Fuel Gas Company, who subordinates its supply to the Hope Company to the preexisting contracts of the United Fuel Company (Rec., 1769, 1776)? If the Hope Company, as under its contract with the Fayette County Gas Company it may, diverts its entire stock of gas to the East Ohio Gas Company and the Peoples Natural Gas Company (Rec., 1560), has the Fayette County Company or the State of Pennsylvania a justicable grievance, and if so, against whom? The East Ohio Gas Company contracts to supply municipalities in Ohio only to the extent of its ability to obtain gas (Rec., 596). Have those munici-

palities, or the consumers therein, or the State of Ohio, a right of action against the Hope Natural Gas Company, on which the East Ohio Company is dependent, or against the Peoples Natural Gas Company, which is contractually entitled to an apportionment, or against West Virginia or Pennsylvaia?

View the case from the standpoint of the vendor companies which, in general, limit their contract obligations to the extent of their gas supply, and are exempted from liability in case of insufficient gas or interruption of service from causes beyond their control, among which causes would be a change of law by West Virginia (*Louisville & N. R. Co. vs. Mottley*, 219 U. S., 467, 484-486). Can the plaintiffs erect into a grievance that for which the vendor companies are not liable?

We think these qnestions answer themselves.

IX.

LEAVING FOR SEPARATE CONSIDERATION THE COMMERCE CLAUSE, THE STATUTE DOES NOT VIOLATE OTHER CONSTITUTIONAL GUARANTEES.

The constitutional objections pressed by the plaintiffs are these:

(1) Impairment of the obligation of contracts.

(2) Deprivation of property without due process of law.

(3) Denial of the equal protection of the laws.

(4) Abridgment of the privileges or immunities of citizens of the plaintiff States or of the United States.

(5) Violation of the interstate commerce clause.

Impairment of Obligation of Contracts, Due Process of Law, and Equal Protection of the Laws.

The constitutionality of the State's exercise of power in the manner of the statute is not successfully impugned by the circumstances that the gas companies have expended money in the construction of pipe lines and pump stations, and that for the supply of gas in foreign States they have made contracts with other companies or consumers there, or that consumers in other States have made contracts or mechanical arrangements for the consumption of gas. The plaintiffs and their citizens, and the gas companies in West Virginia and in the plaintiff States, knew, one and all, from the outset, the peculiar exhaustible nature of gas, the status of the West Virginia companies, and their subordination to West Virginia laws, present or prospective, enacted in the exercise of the police power. If it be true that the State may validly compel the rendition of adequate service to its people by public-service corporations operating within its borders, the State's authority cannot be defeated by expenditures in aid of evasion of that service, or contracts or arrangements having that result.

The contention that the seven companies engaged in business, and that their pipe lines and pump stations were constructed and are used as facilities for the service of consumers in foreign States, is fallacious. These instrumentalities were built and are employed for the transportation of an available volume of gas presently consumed in part within West Virginia and in a greater part outside of the State. So long as these lines and stations are employed for the transportation of this

quantity of gas, their owners are entitled to a fair return upon the reasonable value of their property so employed for the public convenience (*San Diego L & T. Co. vs National City*, 174 U. S., 739; *Cotting vs. Goddard*, 183 U. S., 79; *San Diego L. & T. Co. vs Jasper*, 189 U. S., 439; *Stanislaus Co. vs. San Joaquin & K. R. C. & I. Co.*, 192 U. S., 201; *Knoxville vs. Knoxville Water Co.*, 212 U. S., 1; *Willcox vs. Consolidated Gas Co.*, 212 U. S., 19; *Railroad Com. vs. Cumberland T. & T. Co.*, 212 U. S., 414; *Lincoln Gas & El. Co. vs. Lincoln*, 223 U. S., 345; *Simpson vs. Shepherd*, 230 U. S., 352). And the right would be as clear if an increased quantity, or even the whole, of the gas were consumed in West Virginia as if apportioned to the advantage of other States, as now. The consumption in West Virginia of an augmented amount of gas would, of course, result in an enlarged aggregate of the rates paid by the consumers therein. And it might be that as a consequence of increased devotion of lines and stations to the service of the West Virginia consumers, or a not improbable influence on operating costs, an upward adjustment of rates in West Virginia would be proper. But this, after all, is but a matter of rates. If fairly compensated, the gas companies are not entitled to refuse to West Virginia an adequate service merely because a greater remuneration can be obtained elsewhere.

If in the case of some of these companies contraction of the volume of gas conveyed to other States should result in the impairment and ultimate destruction of the usefulness of transportation or distributing facilities serving only those States, the injury to the owners of these facilities would be more apparent than

real. The tendency of the gas supply to exhaustion, and the obligation to render adequate service to West Virginia consumers, was as well known on the first day of their career as on the last; and all of the gas companies, both in West Virginia and elsewhere, had the right and opportunity to anticipate in charges against consumers the depreciation or obsolescence resulting from diminished usefulness of these facilities (*Knoxville vs. Knoxville Water Co.*, 212 U. S., 1, 11; *Railroad Com. vs. Cumberland Tel. & Teleg. Co.*, 212 U. S., 414, 424; *Simpson vs. Shepherd*, 230 U. S., 352, 458; *Kansas City S. R. Co. vs. United States*, 231 U. S., 423, 446). Whether all of the companies have disinterestedly refrained from exercising this right to compensate themselves we do not stop to inquire; but we perceive no reason for assuming the case to be in their favor on this point. And the affirmative proof, in a number of instances, shows depreciation allowances and reserves (Rec., 263-265, 443-444).

Whatever may be the result in reference to property devoted to the service of consumers in other States or to contracts made with them, or consequentially affecting their service, the constitutional power of West Virginia, nevertheless, remains clear and certain. The expenditures for that property and those contracts were made subject to the police power of the State and find no protection in the constitutional provisions against the impairment of the obligation of a contract or the deprivation of property without due process of law or any other guaranty of the State or Federal Constitution. In *Chicago, B. & Q. R. Co. vs McGuire*, 219 U. S.,

549, 568, referring to the right to make contracts, Mr. Justice Hughes said:

> "It is subject, also, in the field of State action, to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals, and welfare of those subject to its jurisdiction. This limitation has had abundant illustration in a variety of circumstances."

In *Chicago & A. R. Co. vs. Tranbarger*, 238 U. S., 67, it was said:

> "But a more satisfactory answer to the argument under the contract clause, and one which at the same time refutes the contention of plaintiff in error under the due process clause, is that the statute in question was passed under the police power of the State for the general benefit of the community at large and for the purpose of preventing unnecessary and widespread injury to property.
>
> It is established by repeated decisions of this Court that neither of these provisions of the Federal Constitution has the effect of overriding the power of the State to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away, and that all contract and property rights are held subject to its fair exercise. *Atlantic Coast Line R. Co. vs. Goldsboro*, 232 U. S., 548, 558, and cases cited."

In *Hudson County Water Co. vs. McCarter*, 209 U. S., 348, a statute of New Jersey prohibiting the diversion of the water from fresh-water streams of the State to other States was upheld as against the owner of water mains laid for the purpose of carrying water from New Jersey to New York. Overruling the argument that the statute impaired the obligation of contracts, took property without due process of law, and denied the equal protection of the laws, it was said by Mr. Justice Holmes:

> "The defense under the 14th Amendment is disposed of by what we have said. That under Article 1, Section 10, needs but a few words more. One whose rights, such as they are, are subject to State restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter. *Knoxville Water Co. vs. Knoxville*, 189 U. S., 434, 438; *Manigault vs. Springs*, 199 U. S., 473, 480."

In *Rast vs. Van Deman*, 240 U. S., 342, 363, Mr. Justice McKenna said:

> "Besides, as the business is subject to regulation, the contracts made in its conduct are subject to such regulation. *Louisville & N. R. R. Co. vs. Mottley*, 219 U. S., 467, and *New York C. & H. R. R. Co. vs. Gray*, 239 U. S., 583."

As already pointed out, the fact that the exercise of the powers of the State was delayed, does not militate against its legality when exercised.

German-Alliance Ins. Co. vs. Lewis, 233 U. S., 389, 416;
Thornton vs. Duffy, 254 U. S., 361, 369.

Against the application of the foregoing principles, public-service corporations are not immune. The opinion of Mr. Justice Clarke in *Union Dry Goods Co. vs. Georgia Pub. Service Corp.*, 248 U. S., 372, fully demonstrates this. The following cases also, by express adjudication and concrete illustration, show that the requirement from a public-service corporation of adequate service to the public violates no constitutional provision, even though the rendition of such service is attended with pecuniary loss:

> *Wisconsin M. & P. R. Co. vs. Jacobson*, 179 U. S., 287;
> *Atlantic Coast Line R. Co. vs North Carolina Corp. Com.*, 206 U. S., 1;
> *Missouri P. R. Co. vs. Kansas*, 216 U. S., 262;
> *Washington vs. Fairchild*, 224 U. S., 510.

So in *Erie R. Co. vs. Board of Public Utility Com.*, 254 U. S., 394, in refuting an argument against the change of elevation of tracks at crossings, ordered by the Board, it was said:

> "That the States might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. *Denver & R. G. Co. vs Denver*, 250 U. S., 241, 246. To engage in interstate commerce the railroad must get on to the land; and, to get on to it, must comply with the conditions imposed by the State for the safety

of its citizens. Contracts made by the road are made subject to the possible exercises of the sovereign right. * * * If the burdens imposed are so great that the road cannot be run at a profit, it can stop, whatever the misfortunes the stopping may produce."

ABRIDGEMENT OF PRIVILEGES AND IMMUNITIES.

What has been said above applies equally to the claim of abridgement of privileges and immunities of citizens of other States or of the United States. In *Barbier vs. Connolly*, 113 U. S., 27, 32, the whole matter was summed up by Mr. Justice Field as follows:

> "But neither the amendment as a whole, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity."

And see:

Slaughter House Cases, 16 Wall., 36;
Re Kemmler, 136 U. S., 436, 448, 449;
Giozza vs. Tiernan, 148 U. S., 657, 661, 662.

In *Western Union Tel Co. vs. Commercial Mill Co.*, 218 U. S., 406, 418, it was dryly intimated that it was "rather late in the day" to contend that the Fourteenth Amendment, either in the privileges and immunities

clause or the other clauses, prevented "the regulation of public-service corporations" by a State.

We stay for a moment to remark that the plaintiff States are not citizens of any State or of the United States:

> *Stone vs. South Carolina*, 117 U. S., 430, 433;
> *Postal Tel. Cable Co. vs. Alabama*, 155 U. S., 487;
> *Title Guaranty & S. Co. vs. Idaho*, 240 U. S., 136;

and that the gas companies are not citizens within the privileges and immunities clauses of the Federal Constitution:

> *Blake vs. McClung*, 172 U. S., 239, 259;
> *Western Turf Assoc. vs. Greenberg*, 204 U. S., 359, 363;
> *Selover vs. Walsh*, 226 U. S., 112, 126.

X.

THE STATUTE DOES NOT REGULATE INTERSTATE COMMERCE.

It is urged against the statute that it amounts to an unconstitutional regulation of interstate commerce for the reason that if an adequate amount of gas is furnished to West Virginia the volume of gas transported to other States will be diminished. And this objection is argued as if the gas companies held no peculiar relation to West Virginia and were bound by no peculiar obligations to it, and as if the gas affected were a mere ordinary subject of barter and sale, like other commodi-

ties. The contention would be the same in principle, and not more startling in form, if the Consolidated Gas Company of New York City, engaged in supplying artificial gas in the metropolitan territory, should assert the right to abandon its obligations to the citizens of New York upon the plea that it was entitled to enter into interstate commerce by selling its gas to New Jersey or Philadelphia. Indeed, the proposition, when based on the claim of freedom of interstate commerce, would equally support a contention that these companies have the right to export from West Virginia to other States the entire stock of gas at their command. For, as testified by witnesses for the plaintiffs, already quoted, every addition to consumption in West Virginia lessens to that extent the volume of gas available for transport to the other States. And the ultimate conclusion would be that no supply whatever to West Virginia could be compelled.

We think that to the objection, based on the commerce clause, there are several answers:

(1) That the West Virginia public-service corporations have no right to engage in interstate commerce, except in subordination to the performance of their duties to the State;

(2) That if interstate commerce is affected, the effect is only indirect and incidental, and therefore, in the absence of congressional enactment, the effect is not violative of the commerce clause; and

(3) That the duties of these corporations to the State in respect of their gas exist not only during interstate commerce therein, but also before the entry of the gas into that commerce; and the gas enters inter-

state commerce subject to those duties and the operation of the statute.

Interstate Commerce by Public-Service Corporations.

At the outset let us say that we do not in the least doubt that the sale and transportation of gas may be, and often are, interstate commerce. The decisions of this Court foreclose that question in the circumstances then in judgment. *West vs. Kansas Nat. Gas Co.*, 221 U. S., 229; *Haskell vs. Kansas Nat. Gas Co.*, 224 U. S., 217; *Public Utilities Com. vs. Landon*, 249 U. S., 236; *United Fuel Gas Co. vs. Hallanan*, U. S. Adv. Ops, 1921-22, p. 130). It is established also that interstate commerce is not a technical legal conception, but a practical one (*Swift & Co. vs. United States*, 196 U. S., 375, 398, 399; *Public Utilities Com. vs Landon, supra; Stafford vs. Wallace*, U. S. Adv. Ops., 1921-22, 469); and that the free flow of established interstate commerce may not be directly interfered with. (*Lemke vs. Farmers Grain Co.*, U. S. Adv. Ops., 1920-21, p. 273; *Stafford vs. Wallace, supra; United Fuel Gas Co. vs. Hallanan, supra; Eureka Pipe Line Co. vs. Hallanan*, U. S. Adv. Ops., 1921-22, p. 127).

But anterior to sale and transportation, arises the inquiry whether, and to what extent, the person engaging, or desiring to engage, in interstate commerce is lawfully entitled to do so. No doubt the transportation of lottery tickets, prize-fight films, intoxicating liquors and stolen automobiles from one State to another is interstate commerce; but there is no right to carry it on.

The question here is, not whether a State may prohibit or restrict the transportation of natural gas from its territory into another State, but *whether the State may require companies—owing to its people the obligation of adequate service—to perform that service*, even though the performance may involve the intrastate consumption of gas which otherwise might be transported to another State.

If the gas companies owe a duty to the people of West Virginia, the performance of that duty cannot be evaded merely because they prefer to enter into interstate commerce rather than to perform it. In *Hudson County Water Co. vs. McCarter*, 209 U. S., 348, in upholding the validity of a New Jersey statute prohibiting the transportation of water from any fresh-water stream in the State to a place out of the State, Mr. Justice Holmes said:

> "A man cannot acquire a right to property by his desire to use it in interstate commerce. Neither can he enlarge his otherwise limited and qualified right to the same end."

The same principle is asserted in somewhat different form by three judges sitting in the District Court for the Northern District of West Virginia, in *Manufacturers Light & H. Co. vs. Ott*, 215 Fed., 940, 951. Although the question before the court was primarily one of rates, its language is equally applicable to the question of adequacy of service, since the regulatory authority of the State in respect to rates and service rests upon the same basis, the police power. Judge Woods, delivering the opinion, said:

"The testimony is undisputed that the main

source of natural-gas supply is in West Virginia, and that the cost of supplying gas to consumers in that State is necessarily much less than in the other States. It seems obvious that West Virginia corporations supplying gas to the citizens of that State from wells in the State cannot say the rates fixed to consumers in West Virginia are confiscatory, because at the same rates the companies would lose money on business which they had chosen to conduct in other States in association with corporations of those States. Even if it be conceded that interstate commerce is involved, the principle must be regarded as settled beyond dispute."

And, on page 952, it was further said:

"The fact that the Manufacturers Light and Heat Co. may have improvidently accepted franchises from municipalities in Ohio and Pennsylvania requiring gas to be furnished at the same rates charged in West Virginia, and that reductions at these points would require gas to be furnished there at less than cost, may be worthy of consideration by the Commission in prescribing the rates in West Virginia.

But it cannot be controlling, for to hold so would be to enable the gas companies to contract away the police power of the State of West Virginia to require reasonable rates to its own citizens."

In *South Covington & C. S. R. Co. vs. Kentucky*, 252 U. S., 399, 403, the principal business of the company was the carriage of passengers between Cincinnati, Ohio, and Kentucky cities across the Ohio River. A subsidiary corporation through which the South Cov-

ington company operated in part had its termini in Kentucky, though many of the passengers traveled by continuous passage to Cincinnati. The Kentucky statute requiring separate cars or compartments for white and negro passengers was held constitutional, it being said that the effect of the statute, insofar as it touched interstate commerce, was merely incidental. Mr. Justice McKeenna said:

> "There was a distinct operation in Kentucky. An operation authorized and required by the charters of the companies, and it is that operation the act in question regulates, and does no more, and therefore is not a regulation of interstate commerce. This is the effect of the ruling in *South Covington & C. Street R. Co. vs. Covington*, 235 U. S., 537. The regulation of the act affects interstate business incidentally, and does not subject it to unreasonable demands.
>
> The cited case points out the equal necessity, under our system of government, to preserve the power of the States within their sovereignties as to prevent the power from intrusive exercise within the national sovereignty, and an interrurban railroad company deriving its power from the State, and subject to obligations under the laws of the State, should not be permitted to exercise the powers given by the State, and escape its obligations to the State, under the circumstances presented by this record, by running its coaches beyond the State lines."

In *Erie R. Co. vs. Board of Public Com.*, 254 U. S., 394, it was said in regard to an order of the board requiring the change of elevation of tracks at crossings:

> "If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. *Denver & R. G. R. Co. vs. Denver*, 250 U. S., 241, 246. To engage in interstate commerce the railroad must get on to the land; and, to get on to it, must comply with the conditions imposed by the State for the safety of its citizens. Contracts made by the road are made subject to the possible exercise of the sovereign right. * * * If the burdens imposed are so great that the road cannot be run at a profit, it can stop, whatever the misfortunes the stopping may produce."

If it be true, as previously pointed out, that a gas company, or its business, or the commodity in which it deals, is affected by the public interest, precedents are not wanting to show that the principles relating to interstate commerce in ordinary goods and chattels are inapplicable. In *Geer vs. Connecticut*, 161 U. S., 519, and *New York vs. Hesterberg*, 211 U. S., 31, it was held that a State could prohibit the exportation of game killed within its boundaries, and also prohibit the sale therein of game imported from another State. While in these instances the public interest attained the dignity of public ownership, the cases establish that generalizations from authorities referring to ordinary subjects of interstate commerce are inapplicable to a

business or commodity affected with a public interest, and that interstate commerce in a commodity so affected may be restricted, or even prohibited, though such commerce in ordinary merchandise could not be.

It is no answer to what has been said that if a State can compel a supply of gas to its citizens and thereby prevent its exportation to another State, the other State may impose a similar restriction on the interstate shipment of corn, wheat, lumber or other commodities. Those commodities lack entirely the exhaustibility and other peculiarities of gas. Until their production or distribution shall become affected with a public interest in the sense that the gas business is so affected, no such case will occur. In *Tanner vs. Little*, 240 U. S., 369, 385, in sustaining the validity of a statute imposing a heavy license tax on merchants using trading stamps or redeemable coupons, Mr. Justice McKenna said:

> "Nor is there support of the system or obstruction to the statute in declamation against sumptuary laws, nor in the assertion that there is evil lesson in the statute, nor in the prophecies which are ventured of more serious intermeddling with the conduct of business. Neither the declamation, the assertion, nor the prophecies can influence a present judgment. As to what extent legislation should interfere in affairs political philosophers have disputed and always will dispute. It is not in our province to engage on either side, nor to pronounce anticipatory judgments. We must wait for the instance. Our present duty is to pass upon the statute before us, and if it has been enacted upon a belief of evils that is not arbitrary we cannot

measure their extent against the estimate of the Legislature."

In *Noble State Bank vs. Haskell*, 219 U. S., 104, where a law requiring banks to maintain a guaranty fund for the protection of depositors was held valid, Mr. Justice Holmes said:

> "It is asked whether the State could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise."

And see also *German Alliance Ins. Co. vs. Lewis*, 233 U. S., 389, 415.

The case of *West vs. Kansas Nat. Gas Co.*, 221 U. S., 229, already referred to, is not inconsistent with the above views, and does not militate against the statute. In that case, as already noted, neither the corporations and individuals who were plaintiffs, nor their gas, could be said to be affected with a public use, since the persons themselves were not engaged in the business of public gas supply in Oklahoma, and their gas was required by no present necessity in that State. The bills of complaint alleged (as stated in the opinion by Mr. Justice McKenna, p. 244) that the production of that State was "more than 1,000,000,000 cu. ft. of gas per day; that such amount is more than necessary for the demands of the people of the State, and the excess of supply is required to meet the wants of those residing in Missouri and Kansas." Accordingly, the Oklahoma statute was not in substance, or even ostensibly, enacted in regulation of a public utility, so as to render merely indirect or incidental any decrease in the volume of gas trans-

ported out of the State. On the contrary, the principal and direct design of the Oklahoma statute was to prevent exportation of gas. This was the more manifest from the discrimination in respect to the use of highways and the right of eminent domain, made between persons engaged in transporting gas within the State and those transporting it to other States, as pointed out in *Haskell vs. Kansas Nat. Gas. Co.*, 224 U. S., 217, 221, a second appeal of the *West case*. And this dominant design to prohibit interstate transportation is referred to by Mr. Justice McKenna in 221 U. S., 229, 257, where, after citing *Manufacturers' Gas & O. Co. vs. Indiana Gas & O. Co.*, 155 Ind., 545; 58 N. E., 706, he says:

> "The case is valuable because the court, through the same justice who wrote the opinion, distinguished between an exercise of the police power to regulate the taking of natural gas and its prohibition in interstate commerce."

And, at page 262, Mr. Justice McKenna adds:

> "We repeat again there is no question in the case of the regulating power of the State over natural gas within its borders."

The later decisions in *Public Utilities Com. vs. Landon*, 249 U. S., 236, and *Pennsylvania Gas Co. vs. Public Service Com.*, 252 U. S., 23, as well as *Franke vs. Johnstown Fuel Supply Co.*, 70 Pa. Super. Ct., 446, recognize the local character of gas supply and its regulation, even though the gas has therefore been in interstate commerce. And we submit that in the latter aspect the local element equally inheres when by the public interest with which its owner's business or the gas itself is affected, or by the physical process by which

the gas is transported, the gas remains subject to the local use in advance of its last journey across the State line.

INTERFERENCE, IF ANY, WITH INTERSTATE COMMERCE IS INDIRECT AND INCIDENTAL.

If by the statute interstate commerce is affected, the effect is indirect and incidental and does not invalidate the law. The direct purpose of the law is to compel the performance of a public duty by those obligated to perform it, and by a legitimate exercise of the police power to protect against the injury to persons and property consequent on the failure to perform the public duty. Conceivably, interstate commerce might not be affected at all, and this is presently true, if, as the evidence indicates, the gas companies hold in reserve sufficient territory to supply the deficit without subtracting from the quantity of gas transported to other States. But even if the quantity of gas entering into interstate commerce should be diminished as a consequence of the statute, the authorities well establish that the commerce clause would not stand in the way. To argue to the contrary would be to contend that the State would stand powerless to relieve its citizens from the most flagrant discrimination, or even against *a total deprivation of gas*, at the hands of its public-service corporations, which, for gain, preferred to serve consumers in other States.

That the supply of gas for local consumption, even though it may previously have been transported in interstate commerce, or is derived from a common stock, part of which is destined for such transportation, is

essentially a matter of local concern and subject to regulation by the States, in the absence of interference by Congress, is clear.

Pennsylvania Gas Co. vs. Public Service Com., 252 U. S., 23;
Public Utilities Com. vs. Landon, 249 U. S., 236;
Manufacturers Light & Heat Co. vs. Ott, 215 Fed., 940;
Franke vs. Johnstown Fuel Supply Co., 70 Pa. Super. Ct., 446;
State vs. Flannelly, 96 Kan., 372; 152 Pac., 22;
Union Dry Goods Co. vs. Georgia Public Service Com., 248 U. S., 372;
Mill Creek Coal & Coke Co. vs. Public Service Com., 84 W. Va., 662; 100 S. E., 557.

In *Pennsylvania Gas Co. vs. Public Service Com.*, 252 U. S., 23, 30, Mr. Justice Day said:

"The thing which the State Commission has undertaken to regulate, while part of an interstate transmission, is local in its nature, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown, in the State of New York. The pipes which reach the customers served are supplied with gas directly from the main of the company, which brings it into the State; nevertheless, the service rendered is essentially local, and the sale of gas is by the company to local consumers, who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to factories and residences as it is required for use. The service is

similar to that of a local plant furnishing gas to consumers in a city.

> This local service is not of that character which requires general and uniform regulation of rates by congressional action, and which has always been held beyond the power of the States, although Congress has not legislated upon the subject. While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers is required in the public interest, and has not been attempted under the superior authority of Congress.
>
> "It may be conceded that the local rates may affect the interstate business of the company. But this fact does not prevent the State from making local regulations of a reasonable character. Such regulations are always subject to the exercise of authority by Congress, enabling it to exert its superior power under the commerce clause of the Constitution."

The validity of State legislation incidentally or indirectly affecting interstate commerce, even though it diverts to the local need commodities or facilities which otherwise might go into or aid interstate commerce, has been upheld by repeated adjudications. The principle is clearly stated by Mr. Justice Hughes in the *Minnesota Rate Cases* (*Simpson vs. Shepard*, 230 U. S., 352), where, after saying that the States cannot directly tax interstate commerce or prohibit interstate trade in legitimate articles of commerce, he says:

> "But within these limitations there necessarily remains to the States until Congress acts, a wide

range for the permissible exercise of power appropriate to their territorial jurisdiction, although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by State legislation from the foundation of the government, because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the States should continue to supply the needed rules until Congress should decide to supersede them. Further, it is competent for a State to govern its internal commerce, to provide local improvements, *to create and regulate local facilities*, to adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people, although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which *the State appropriately deals in*

making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action." (Italics ours).

And again, on page 410, is set forth the exact principle for which we contend, stated as follows:

> "In the intimacy of commercial relations much that is done in the superintendence of local matters may have an indirect bearing upon interstate commerce. *The development of local resources and the extension of local facilities may have a very important effect upon communities less favored,* and to an appreciable degree alter the course of trade. The freedom of local trade may stimulate interstate commerce, while restrictive measures within the police power of the State, enacted exclusively with respect to internal business, as distinguished from interstate traffic, may in their reflex or indirect influence *diminish the latter and reduce the volume of articles transported into or out of the State.* It was an objection of this sort that was urged and overruled in *Kidd vs. Pearson,* 128 U. S., 1, to the law of Iowa prohibiting the manufacture and sale of liquor within the State, save for limited purposes. See also *Geer vs. Connecticut,* 161 U. S., 519, 534; *Austin vs. Tennessee;* 179 U. S., 343; *Capital City Dairy Co. vs. Ohio,* 183 U. S., 238, 245; *Missouri P. R. Co. vs. Kansas,* 216 U. S., 261." (Italics ours.)

The principle that interstate commerce may constitutionally be affected indirectly or incidentally by the State in the exercise of its police power has been asserted in many cases, wherein the inevitable result of the regulation within the State has been to subtract from the quantity of a commodity entering into interstate commerce. Examples are readily afforded by the instance of the prohibition of the manufacture and sale of intoxicating liquors (*Kidd vs. Pearson,* 128 U. S., 1); the prevention of the sale of oleomargarine, colored so as to imitate butter (*Plumley vs. Massachusetts,* 155 U. S., 461; *Capital City Dairy Co. vs. Ohio,* 183 U. S., 238); the shipment of game out of the State or the sale of imported game within the State (*Geer vs. Connecticut,* 161 U. S., 519; *New York vs. Hesterberg,* 211 U. S., 31); the transportation of water out of the State (*Hudson County Water Co. vs. McCarter,* 209, U. S., 348), and the shipment of immature citrus fruit from a State largely engaged in the production thereof (*Sligh vs. Kirkwood,* 237 U. S., 52). And it has been held that a general restriction of pipe-line pressure which in practical result would prevent transportation of gas out of a State was valid (*Jamieson vs. Indiana Natural Gas & O. Co.,* 128 Ind., 555; 28 N. E., 76).

The police power of the State embraces, to this extent of indirect or incidental interference, commodities which are actually in interstate commerce. The fact that they are in such commerce does not necessarily withdraw them from the operation of reasonable State laws. The repeatedly held valid State inspection and labelling laws, designed to promote public health

and safety, though applied to commodities in original packages, are a commonplace example.

Plumley vs. Massachusetts, 155 U. S., 461;
Patapsco Guano Co. vs. Board of Agriculture, 171 U. S., 345;
Schollenberger vs. Pennsylvania, 171 U. S., 1;
Crossman vs. Luiman, 192 U. S., 189;
Savage vs. Jones, 225 U. S., 501;
Standard Stock Food Co. vs. Wright, 225 U. S., 540.

The rule is the same as to the instrumentalities of interstate commerce.

Smith vs. Alabama, 124 U. S., 465;
Nashville C. & St. L. R. Co. vs. Alabama, 128 U. S., 96;
New York, N. H. & H. R. Co. vs. New York, 165 U. S., 628;
Erb vs. Morasch, 177 U. S., 584;
Davis vs. Cleveland, C. C. & St. L. R. Co., 177 U. S., 157;
Southern R. Co. vs. King, 217 U. S., 324;
Chicago, R. I. & P. R. Co. vs. Arkansas, 219 U. S., 453;
Atlantic Coast Line R. Co. vs. Georgia, 234 U. S., 280;
St. Louis, I. M. & S. R. Co. vs. Arkansas, 240 U. S., 518.

Though interstate commerce be incidentally or indirectly affected, the police power of the State includes the authority to compel a reasonably adequate service to the communities within it at the hands of a public-service corporation, though it is engaged in interstate

commerce; and *up to the point where reasonably adequate local facilities are afforded by a public-service corporation, the State may exercise a free hand. Until that point is passed, interstate commerce is not unconstitutionally infringed.*

In *Chicago, B. & Q. R. Co. vs. Railroad Commission*, 237 U. S., 220, 226, it was said:

> "In reviewing the decision we may start with certain principles as established: (1) It is competent for a state to require adequate local facilities, even to the stoppage of interstate trains or the rearrangement of their schedules. (2) Such facilities existing—that is, the local conditions being adequately met,—the obligation of the railroad is performed, and the stoppage of interstate trains becomes an improper and illegal interference with interstate commerce."

The proposition is negatively stated in *Mobile, J. & K. C. R. Co. vs. Mississippi*, 210 U. S., 187, wherein it was said:

> "It is enough to add to that which we have said, that the decree of the Supreme Court does not work an interference with, or cast a direct burden upon, interstate commerce. The cases of the *Illinois C. R. Co. vs. Illinois*, 163 U. S., 142; *Cleveland, C., C. & St. L. R. Co. vs. Illinois*, 177 U. S., 514, and *Mississippi R. Commission vs. Illinois C. R. Co.*, 203 U. S., 335, cited by the companies to sustain their contentions, are not apposite. In those cases there was an interference with interstate trains for local purposes, though local needs had been adequately supplied."

And see:

Gladson vs. Minnesota, 166 U. S., 427;
Lake Shore & M. S. R. Co. vs. Ohio, 173 U. S., 285;
Wisconsin & P. R. Co. vs. Jacobson, 179 U. S., 287;
Atlantic Coast Line R. Co. vs. North Carolina Corp. Com., 206 U. S., 1;
Missouri P. R. Co. vs. Larabee Flour Mills Co., 211 U. S., 612;
Missouri P. R. Co. vs. Kansas, 216 U. S., 472;
Washington vs. Fairchild, 224 U. S., 510;
Grand Trunk R. Co. vs. Michigan R. Com., 231 U. S., 457;
Chicago, M. & St. P. R. Co. vs. Iowa, 233 U. S., 334;
Michigan C. R. Co. vs. Michigan Railroad Commission, 236 U. S., 615;
Illinois Central R. Co. vs. Mulberry Hill Coal Co., 238 U. S., 275;
Seaboard Air Line R. Co. vs. Railroad Com., 240 U. S., 324.

Local Character of Gas Supply and Point of Entry of Gas Into Interstate Commerce.

We have already argued that the seven gas companies and others similarly situated, from their legal status, were and are incapacitated from engaging in interstate commerce, except in subordination to the fulfillment of their duty to consumers in West Virginia and to the extent of the surplus remaining after the fulfillment of that duty. Stated in another way, the gas

in the pipe lines remains subject to the public interest and the duty of these companies as long as that duty remains unperformed, or until the public interest and the duty are effectually evaded by the escape of the gas over the State boundary.

But the objection that interstate commerce is interfered with, fails entirely when the transaction is analyzed in point of time. The duty of reasonably adequate service rests on the gas company in its character of a public service corporation. It exists prior to and contemporaneously with its acquisition of the gas, wherewith it is to perform its duty.

That the production of gas, or coal, or any other commodity, though intended for interstate commerce, is not interstate commerce, is now settled. The point was lately involved in the Pennsylvania Anthracite Tax Case.

Heisler vs. Thomas Colliery Co., U. S. Adv. Ops., 1922-23, p. 119;
Hammer vs. Dagenhart, 247 U. S., 251, 272;
Delaware, L. & W. R. R. Co. vs. Yurkonis, 238 U. S., 439;
United Mine Workers vs. Coronado Coal Co., U. S. Adv. Ops., 1921-22, p. 643.

In *Heisler vs. Thomas Colliery Co.*, it was said, referring to *Coe vs. Errol*, 116 U. S., 517:

"To express it, as the court did, 'there must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation; and that moment seems to us to

be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination.'

And again: 'Nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State.' Until then, it was said that they were a part of the general mass of property of the State, and subject to its jurisdiction."

See also:

American Steel & W. Co. vs. Speed, 192 U. S., 500, 520;

General Oil Co. vs. Crain, 209 U. S., 211;

Bacon vs. Illinois, 227 U. S., 502;

Susquehanna Coal Co. vs. South Amboy, 228 U. S., 665;

McCluskey vs. Marysville & N. R. Co., 243 U. S., 36;

Arkadelphia Mill. Co. vs. St. Louis S. W. R. Co., 249 U. S., 134;

Crescent Cotton Oil Co. vs. Mississippi, U. S. Adv. Ops., 1921-22, p. 55.

Though applied at the destination, the following in regard to gas are similar in principle:

Public Utilities Co. vs. Landon, 249 U. S., 236;

Pennsylvania Gas Co. vs. Public Service Com., 252 U. S., 23;

Franke vs. Johnstown Fuel Supply Co., 70 Pa., Super. Ct., 446.

Before gas can enter into interstate commerce, it must become property susceptible of such commerce. Until it is reduced to possession by being brought into the well or to the surface of the earth, there is no property in it, save as a qualified right thereto as part of the land. In *Walls vs. Midland Carbon Co.,* 254 U. S., 300, 316, it was remarked, referring to *Ohio Oil Co. vs. Indiana,* 177 U. S., 190:

> "We said, citing a case, 'possession of the land is not necessarily possession of the gas,' and again, on the authority of cases, 'that the property of the owner of lands in oil and gas is not absolute until it is actually in his grasp, and brought to the surface.'"

In *West vs. Kansas Nat. Gas Co.,* 221 U. S., 229, 254, it was said:

> "Gas, when reduced to possession, is a commodity; it belongs to the owner of the land; and when reduced to possession, is his individual property, subject to sale by him, and may be a subject of intrastate commerce and interstate commerce."

The same principle was announced in *Ohio Oil Co. vs. Indiana,* 177 U. S., 190, as the law of Indiana, and *Peoples Gas Co. vs. Tyner,* 131 Ind., 281, 31 N. E., 59, was quoted as follows:

> "It has been settled in this state that natural gas, when brought to the surface of the earth and placed in pipes for transportation is property, and may be the subject of interstate commerce."

This is the law of West Virginia. In *Hall vs. Vernon,* 47 W. Va., 295, 34 S. E., 764, it was said:

> "Natural gas is incapable of being absolute property, and is the subject of qualified property only. *Wood Co. Petroleum Co. vs. West Virginia Transp. Co.,* 28 W. Va., 210. * * * 'There can be no property in rock or mineral oil, nor can title thereto be divested or acquired, until it has been taken from the earth.'"

Until reduced to possession, the gas is part of the real estate.

Brown vs. Spilman, 155 U. S., 665;
Carter vs. Tyler Co. Court, 45 W. Va., 806, 810, 32 S. E., 216;
Preston vs. White, 57 W. Va., 278, 282, 50 S. E., 236;
Warren vs. Boggs, 83 W. Va., 89, 96, 97 S. E., 589.

And see:

Kelly vs. Ohio Oil Co., 57 Ohio St., 317, 49 N. E., 399;
Nonamaker vs. Amos, 73 Ohio St., 163, 76 N. E., 949;
Brown vs. Vandergrift, 80 Pa., 142;
Westmoreland & C. Nat. Gas Co. vs. De Witt, 130 Pa., 235, 18 Atl., 724;
Jones vs. Forest Oil Co., 194 Pa., 379, 44 Atl., 1074.

It follows, therefore, that at the very moment when gas produced by or for a public service gas company becomes property, and the subject of commerce, it finds the

gas company incumbered with the obligation of public service, and subject to the statute. This is true, even though the gas is straightway discharged into the pipeline. It is the more clearly true of those wells which are shut in either upon completion of the drilling or in order to rest them after a period of use. (Rec. 331, 332, 437, 439, 322.)

ERRATUM:

Page 220. This paragraph, beginning "In conclusion," should be stricken out.

In this aspect there is no distinction between the gas produced by the gas company itself and that purchased from other producers. The situation of gas purchased at the well (Rec. 1263) is identical with that of gas produced by the purchasing company. And as to gas delivered into the pipe line of the purchasing company elsewhere than at the producer's well, it cannot be said that it has commenced its final movement for transportation from the State of its origin to that of its destination, or started its ultimate passage to the other State prior to such delivery to the purchasing company. (*Coe vs. Errol*, 116 U. S., 517; *Heisler vs. Thomas Colliery Co.*, U. S. Adv. Ops., 1922-23, p. 119; *Champaign Realty Co. vs. Brattleboro*, U. S. Adv. Ops., 1922-23, p. 165, and other cases above cited.) But whatever the point of delivery to the gas company,

if the gas enters interstate commerce prior thereto, it is because its transit before the delivery to the gas company transporting it out of the State is in conjunction with, and forms a part of, the interstate commerce of the latter company. And being so, the gas company's obligation of public service exists before and at the beginning of the interstate commerce no less than thereafter, and the gas received finds the gas company encumbered with the obligation of public service and subject to the statute.

It follows from the foregoing that, as the obligation of the gas company and the operation of the statute exist at the moment when the gas first enters interstate commerce, such commerce is subject to the condition that reasonably adequate service shall be rendered in West Virginia.

Before the decision of *Hallanan vs. United Fuel Gas Co.*, U. S. Adv. Ops., 1921-22, p. 130, we argued that the owner of the pipe line being subject to the duty of public service, and the gas in the pipe line being commingled and subject to drafts for supply in West Virginia, the gas is not in interstate commerce until after the last point has been passed at which it is drawn on for the local supply. We do not argue against that decision; but we think that as it did not directly involve the question of adequacy of public service in West Virginia by the United Fuel Gas Company, the holding is not fully applicable to the cases at bar. We think that with the added element of the duty of public service on the part of the owner of the pipe line, the

pipe line is properly viewed, not only as an instrumentality of transportation, but also as a reservoir for the distribution of the gas, both that supplied within the State and that destined for other States. And in this light a situation is presented more nearly like that involved in the following cases, as explained in *Champaign Realty Co. vs. Battleboro*, U. S. Adv. Ops., 1922-23, p. 165:

> *Bacon vs. Illinois*, 227 U. S., 504;
> *General Oil Co. vs. Crain*, 209 U. S., 211;
> *American Steel & W. Co. vs. Speed*, 192 U. S., 500;
> *Diamond Match Co. vs. Ontonagon*, 188 U. S., 82.

We think, too, the fact that in the *Hallanan Case* much the greater part of the gas was destined to other States, as was the condition of most of the grain in *Lemke vs. Farmers Grain Co.*, U. S. Adv. Ops., 1921-22, p. 275, creates a distinction. These cases may apply when most of a commodity is to be taken to another State. But the question remains whether they apply to gas in a pipe line, most of which is intended for consumption within the State; and whether they will govern even in the ultimate time when by reason of the continuing depletion of the gas ninety-nine per cent. of the gas in a particular pipe line remains in West Virginia and one per cent. goes elsewhere. A holding that the statute is invalid and an injunction against its enforcement on the ground of interference with

interstate commerce, would equally apply to the extreme, but probable, situation last suggested.

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FRED O. BLUE,
GEORGE M. HOFFHEIMER,
PHILIP P. STEPTOE,
WILLIAM S. JOHN,
Counsel for the State of West Virginia, Defendant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

15-16
~~17-18~~

Nos. ~~20-21~~, Original.

THE COMMONWEALTH OF PENNSYLVANIA,
COMPLAINANT,

vs.

THE STATE OF WEST VIRGINIA, DEFENDANT.

THE STATE OF OHIO, COMPLAINANT,

vs.

THE STATE OF WEST VIRGINIA, DEFENDANT. 10

BRIEF FOR DEFENDANT, THE STATE OF WEST VIRGINIA.

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Attorney General of West Virginia;
FRED O. BLUE,
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BRIEF FOR DEFENDANT, THE STATE OF WEST VIRGINIA.

Statement of the Cases.

On February 10, 1919, the Legislature of West Virginia enacted the following statute (*W. Va. Acts of* 1919, Ch. 71):

"An Act in relation to persons, firms and corporations engaged in furnishing, or required by law to furnish, natural gas for public use within this

State, to provide remedies for the enforcement of this act and penalities and punishment for violations thereof, and to extend the jurisdiction of the public service commission and of the courts of this State with respect thereto.

Be it enacted by the Legislature of West Virginia:

SECTION 1. That every person engaged in furnishing, or required by law (whether statutory or common law) to furnish, natural gas for public use, or for the use of the public, or any part of the public, whether for domestic, industrial or other consumption, within this State, shall to the extent of his supply of said gas produced in this State, (whether produced by such person or by any other person), furnish for public use within the territory of this State, and for the use of the public and every part of the public within the territory of this State, in or from which such gas is produced, or through which said gas is transported, or which is served by such person, a supply of natural gas reasonably adequate for the purposes, whether domestic, industrial or otherwise, for which natural gas is consumed or desired to be consumed by the public, or any part of the public, within said territory in this State, and for which said consumer or consumers therein shall apply and be ready and willing to make payment at lawful rates.

SECTION 2. That in case any person engaged in furnishing or required by law (whether statutory or common law) to furnish, natural gas for public use within this State, or for the use of the public or any part of the public within this State, shall have a production or supply of natural gas which is, or probably will be, insufficient to furnish for such use, (for

the purposes, whether domestic, industrial or otherwise, for which natural gas is consumed by the public or any part of the public), within the territory in this State served by such person, then and in that event the public service commission shall have authority, and the same is hereby conferred on it, upon the application of any such person or any of his consumers within this State and after due hearing upon notice and proof to the satisfaction of the commission that public convenience and necessity so require, to order any other person engaged in furnishing, or required by law (whether statutory or common law), to furnish natural gas for public use within this State, and producing or furnishing natural gas for public use in said territory or transporting the same through said territory, to furnish to such person having such insufficient production or supply, natural gas for the purpose of supplying such deficiency, at and during such times, upon and at such just and reasonable terms, conditions and rates, and in such amounts, as the commission shall prescribe. And whenever, after such hearing upon notice and proof, the commission shall determine that public convenience and necessity so require, the commission shall have authority to provide for and compel the establishment of a reasonable physical connection or connections between the lines, pipes or conduits of such person having such excess supply of gas and the lines, pipes or conduits of the person having such deficiency of supply, and to require the laying and construction of such reasonable extensions of lines, pipes or conduits as may be necessary for the establishment of such physical connection or connections, and to ascertain, determine and fix the just and reasonable terms and conditions of such connection or connections, including just and reasonable

State, to provide remedies for the enforcement of this act and penalities and punishment for violations thereof, and to extend the jurisdiction of the public service commission and of the courts of this State with respect thereto.

Be it enacted by the Legislature of West Virginia:

SECTION 1. That every person engaged in furnishing, or required by law (whether statutory or common law) to furnish, natural gas for public use, or for the use of the public, or any part of the public, whether for domestic, industrial or other consumption, within this State, shall to the extent of his supply of said gas produced in this State, (whether produced by such person or by any other person), furnish for public use within the territory of this State, and for the use of the public and every part of the public within the territory of this State, in or from which such gas is produced, or through which said gas is transported, or which is served by such person, a supply of natural gas reasonably adequate for the purposes, whether domestic, industrial or otherwise, for which natural gas is consumed or desired to be consumed by the public, or any part of the public, within said territory in this State, and for which said consumer or consumers therein shall apply and be ready and willing to make payment at lawful rates.

SECTION 2. That in case any person engaged in furnishing or required by law (whether statutory or common law) to furnish, natural gas for public use within this State, or for the use of the public or any part of the public within this State, shall have a production or supply of natural gas which is, or probably will be, insufficient to furnish for such use, (for

the purposes, whether domestic, industrial or otherwise, for which natural gas is consumed by the public or any part of the public), within the territory in this State served by such person, then and in that event the public service commission shall have authority, and the same is hereby conferred on it, upon the application of any such person or any of his consumers within this State and after due hearing upon notice and proof to the satisfaction of the commission that public convenience and necessity so require, to order any other person engaged in furnishing, or required by law (whether statutory or common law), to furnish natural gas for public use within this State, and producing or furnishing natural gas for public use in said territory or transporting the same through said territory, to furnish to such person having such insufficient production or supply, natural gas for the purpose of supplying such deficiency, at and during such times, upon and at such just and reasonable terms, conditions and rates, and in such amounts, as the commission shall prescribe. And whenever, after such hearing upon notice and proof, the commission shall determine that public convenience and necessity so require, the commission shall have authority to provide for and compel the establishment of a reasonable physical connection or connections between the lines, pipes or conduits of such person having such excess supply of gas and the lines, pipes or conduits of the person having such deficiency of supply, and to require the laying and construction of such reasonable extensions of lines, pipes or conduits as may be necessary for the establishment of such physical connection or connections, and to ascertain, determine and fix the just and reasonable terms and conditions of such connection or connections, including just and reasonable

rules and regulations and provision for the payment of the costs and expense of making the same or for the apportionment of such cost and expense as may appear just and reasonable. *Provided, however*, that no person shall, by virtue of this section, be ordered to furnish natural gas to any other person so engaged in furnishing, or required by law to furnish, natural gas for public use, except to the extent that the person so ordered to furnish natural gas shall, at the time, have a production or supply of natural gas in excess of the quantity sufficient to furnish a reasonably adequate supply to his consumers within this State; nor shall any person, by virtue of this section, be ordered to furnish natural gas to any other person so engaged in furnishing or required by law to furnish, natural gas for public use in a territory within this State, if and when the said person having said excess shall, to the extent of such excess, be ready and willing to furnish, and within such time as the commission shall prescribe, shall actually furnish, to the consumers within said territory a reasonably adequate supply of natural gas.

SECTION 3. That insofar as the same shall not be in conflict with this act, all of the authority, powers, jurisdiction and duties conferred and imposed on the public service commission by the act entitled, "An act to create a public service commission and to prescribe its powers and duties, and to prescribe penalties for the violations of the provisions of this act," passed February twenty-first, one thousand nine hundred and thirteen, as amended by the act entitled "An act to amend and re-enact sections one, two, three, four, five, nine, ten, fourteen, fifteen and twenty-two, of chapter nine of the acts of one thousand nine hundred and thirteen, creating a public

service commission, prescribing its powers and duties, and penalties for violation of the provisions of said chapter, and to add thereto six sections to be known as sections twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight, enlarging the powers and duties of said public service commission, prescribing additional penalties and giving to the commission power to punish for contempt," passed February tenth, one thousand nine hundred and fifteen, are hereby conferred and imposed on the public service commission in respect to the subject matter of this act, or any part thereof.

SECTION 4. That in case of violation of any provision of this act any person aggrieved or affected thereby may complain thereof to the public service commission in like manner, and thereupon such procedure shall be had, as is provided in respect to other complaints to or before said commission, and all such proceedings and remedies may be taken or had for the enforcement or review of the order or orders of said commission, and for the punishment of the violation of such order or orders, as are provided by law in respect to other orders of said commission. In case of the violation of any provision of this act, the public service commission, or any person aggrieved or affected by such violation, in his own name, may apply to any court of competent jurisdiction by a bill for injunction, petition for writ of mandamus or other appropriate action, suit or proceeding, to compel obedience to and compliance with this act, or to prevent the violation of this act, or any provision thereof, pending the proceedings before said commission, and thereafter until final determination of any action, suit or proceeding for the enforcement or review of the final order of said

commission; and such court shall have jurisdiction to grant the appropriate order, judgment or decree in the premises.

SECTION 5. That if any person subject to the provisions of this act shall fail or refuse to comply with any requirement of the commission hereunder, such person shall be subject to a fine of not less than one hundred dollars nor more than five hundred dollars for each offense; and such person, or the officers of the corporation, where such person is a corporation, may be indicted for their failure to comply with any requirement of the commission under the provisions of this act, and upon conviction thereof, may be fined not to exceed five hundred dollars, and in the discretion of the court, confined in jail not to exceed thirty days. Every day during which any person, or any officer, agent or employee of such person, shall fail to observe and comply with any order or direction of the commission, or to perform any duty enjoined by this act, shall constitute a separate and distinct violation of such order or direction of this act, as the case may be.

SECTION 6. That any person claiming to be damaged by any violation of this act may bring suit in his own behalf for the recovery of the damage from the person or persons so violating the same in any circuit court having jurisdiction. In any such action the court may compel the attendance of the person or persons against whom said action is brought, or any officer, director, agent, or employee of such person or persons, as a witness, and also require the production of all books, papers and documents which may be useful as evidence, and in the trial thereof such witness may be compelled to testify, but any such witness shall not be prosecuted for any offense concerning which he is compelled hereunder to testify.

SECTION 7. That the word "person" within the meaning of this act shall be construed to mean, and to include, persons, firms, and corporations.

SECTION 8. That the sections, provisions, and clauses of this act shall be deemed separable each from the other, and also in respect to the persons, firms, corporations, and consumers mentioned therein or affected thereby, and if any separable part of this act be, or be held to be unconstitutional or for any reason invalid or unforceable, the remaining parts thereof shall be and remain in full force and effect.

SECTION 9. That all acts and parts of acts in conflict with this act are hereby repealed."

This statute was preceded by the Public Service Commission Act, set forth as Exhibit "B," with the answers of West Virginia, which Act was designed to require reasonableness of rates, service and practices, and to prevent unjust preferences and discrimination, by public-service corporations, including natural-gas companies, and to that end provided an administrative commission, to whose jurisdiction the due administration of the Act of 1919, here involved, was confided.

The States of Ohio and Pennsylvania, by their respective bills of complaint, complain that the enforcement of the Act of 1919 will necessarily prevent the transportation of West Virginia gas into Ohio and Pennsylvania, thereby destroying the investment of many of their citizens in natural-gas properties in West Virginia and also affecting the health and comfort, and endangering the lives, of numerous inhabitants of the plaintiff States who are presently consuming West Virginia gas; and thereupon the statute is attacked as

unconstitutional and violative of those provisions of the Federal Constitution relating to interstate commerce, impairment of contract obligations, due process of law, equal protection of the laws, and abridgment of the privileges and immunities of citizens of the plaintiff States and of the United States.

Preliminary injunctions, awarded June 3, 1919, prior to answer by West Virginia, and in advance of any test of the statute's actual operation, have prevented its enforcement.

By its motion to dismiss and answer filed in each case, the State of West Virginia first challenges the right of the plaintiff States to maintain these suits, and then answers upon the merits, giving the history of the statute, the local causes and conditions leading to its enactment, and denies that the statute in anywise contravenes the Federal Constitution.

The issues before the court are, therefore:

(1) Whether the plaintiff States can maintain their suits in original jurisdiction as controversies between two States.

(2) Whether the West Virginia statute in question is violative of the Federal Constitution:

(*a*) As an interference with interstate commerce;

(*b*) As an impairment of contract obligations;

(*c*) As depriving the plaintiffs, or their citizens, of property without due process of law;

(*d*) As denying to the plaintiff States, or their citizens, the equal protection of the laws;

(*e*) As abridging the privileges and immunities of citizens of the plaintiff States and of the United States.

Purpose of the Statute.

The statute is the culmination of the effort of West Virginia to compel by express and unmistakable enactment its public-service corporations, engaged in the natural gas industry within its borders—and endowed by it with special rights and privileges—to fulfill their public duties and the conditions of their existence, by rendering a reasonably adequate service, out of the abundance of West Virginia gas, to those consumers of that State designated in the statute. It was not aimed at Ohio or Pennsylvania, or at their inhabitants, although it is true that consumers in those States may be incidentally and indirectly affected by the possible reduction in the quantity of West Virginia gas which they have hitherto used. It does not prohibit, or seek to prohibit, the exportation of gas from West Virginia.

And since in suits ostensibly maintained in this Court in the exercise of its original jurisdiction of controversies between States, the tenor of the evidence, with its reference to the investments, properties and conditions of particular gas companies, and the personnel of the witnesses for the plaintiffs, have stamped these cases as litigation between those companies and West Virginia, it is proper to stress at the outset what a mere reading of the statute makes manifest: that the statute embraces in its purview all public-service gas companies alike, and in no respect singles out the exporting companies—not even the seven companies hereinafter specially mentioned.

Necessity and History of the Statute.

In a record of the present bulk, even condensed narrative wears the color of prolixity. And where contemporary causes and conditions combine to produce an ultimate consequence, strict observance of chronological sequence and the avoidance of repetition in the separate chapters concurring to produce the whole are hardly practicable. With these qualifications we proceed to state, as shortly as the record and the importance of the cases seem to admit, the facts and circumstances in the legislative view, and the causes and conditions which created the necessity for, and justify the reasonableness of, the statute and brought about its passage.

Natural gas is produced by drilling wells into gas-containing strata or sands in the earth. The known fields in and from which gas is derived are, as a rule, comparatively few and restricted in area, the outstanding exception being those of West Virginia, which are in size and number so great as to constitute a more or less connected field extending across the State from north to south. As the number of gas wells in any field or other given area increases and the time during which the extraction of gas therefrom lengthens, the volume of the gas and the natural or rock pressure, upon which the output depends, gradually diminish, not only in the individual wells, but also in the entire field. The constant tendency, therefore, is in the direction of depletion of the field and exhaustion of the gas supply therefrom. And while for a considerable period the aggregate quantity of gas produced from a specific field may be increased or maintained at substantial uniformity, this can only be accom-

plished by the drilling of new wells, the added extraction of gas from which still further accelerates the depletion of the field. For this reason it becomes necessary to sustain the output by exploration for new gas territory, and the development thereof when discovered. But even this extension of territory cannot be continued indefinitely, and the later-discovered territories themselves are subjected to the same process of depletion and to the exhaustion of their gas. And so it occurs ultimately that the supply of gas, once adequate to the needs of the population dependent thereon, becomes insufficient for the service of all, and the uses of the gas, or the extent of its distribution and consumption, must be correspondingly curtailed.

The foregoing was the experience in Ohio, Pennsylvania and Indiana, where the extensive development and utilization of their own gas, and the manifest tendency thereof to exhaustion, preceded the transportation of West Virginia gas to the other States. And this experience, now in course of duplication in West Virginia, was well known to the gas companies and producers before and at the time of the commencement of their business. And it was equally known to the people of those States, for whose consumption the gas from West Virginia was and is so transported.

West Virginia Gas Development and Utilization.

West Virginia is, and for more than twenty years last past has been, one of the principal gas-producing States. The volume of its production is, and for twelve years last past has been, the largest in the United States. At present gas is produced in large quantities in and from the counties

of Boone, Braxton, Brooke, Cabell, Calhoun, Clay, Doddridge, Gilmer, Hancock, Harrison, Kanawha, Lewis, Lincoln, Logan, Marion, Marshall, Mingo, Monongalia, Nicholas, Ohio, Pocahontas, Pleasants, Putnam, Ritchie, Roane, Taylor, Tyler, Upshur, Wayne, Wetzel, Wirt and Wood, being thirty-two of the fifty-five counties; while gas has been found in paying quantities, and large areas are leased and held as prospective gas territory, in six other counties (Rec., 980). The earliest West Virginia development was in the northern section. Originally considered a nuisance in the oil operations, with which it was first produced, the gas was blown into the air and wasted; but later its value for domestic heating and lighting, as well as for factory fuel and general industrial use, was recognized. Wells were then drilled for gas. The enormous production and very great rock pressure (sometimes called natural pressure) in the early wells enabled the gas to be transported through pipe lines for considerable distances without the assistance of compressors; and aside from the cost of leases and drilling, the mere laying of a pipe line to the point of distribution was practically all of the investment required for local use.

In many instances small companies or individual operators obtained franchises and furnished gas to a municipality or community near at hand. Other and larger concerns connected their gas wells and lines into systems serving under franchises a number of separate municipalities and localities. As early as 1892 and 1893 the largest and most important cities and towns in the northern and north-central sections of West Virginia were being thus served with gas by local companies, viz., Wheeling, Moundsville, Morgantown, Fairmont, Clarksburg, Grafton, Weston, West

n, Parkersburg, Sistersville, St. Marys, and many other
cipalities in the Panhandle section and throughout the
ies of Marshall, Wetzel, Monongalia, Marion, Harri-
Lewis, Doddridge, Ritchie, Tyler, Pleasants and Wood
., 1117 *et seq.* 1173-4, 1218, 1343).

abundance, cleanliness, convenience and economy over
forms of fuel were so great that the use of gas spread
lly, and it soon became the universal and exclusive fuel
e northern and north-central sections of West Virginia
lwelling-houses, business buildings, churches, schools,
ges, hospitals, asylums, court-houses, electric light and
r plants, water works, municipal street lighting and
y other purposes. In the then existing dwellings and
lings, the means and appliances for consumption of
r fuel were generally discarded. New houses and build-
were in general constructed and equipped with a view
he exclusive use of gas for heating, and, in many in-
ces, for illumination (Rec., 1119-1122, 1220-1223,
3). The existing industries adopted gas for fuel, and a
t number of new factories and other industries to which
p fuel was important were established. The local gas
panies in many instances, in order to upbuild the munic-
ities served by them, and thereby to stimulate the con-
ption of their gas, pursued for many years the policy of
uraging the establishment of new industries by the offer
gas at low prices during long periods of time. The in-
tries thus established were located and constructed for,
their processes and products especially adapted to, the
of gas as fuel. They employed many workmen and
rers, both skilled and unskilled, who were dependent
employment and the livelihood of themselves and their

families on the existence and continued operation of the gas-using industries. The population and wealth of the cities, towns and communities so supplied with gas, and of the State as a whole, thus increased; and the added population at once profited the gas companies by adding to the consumption of their gas, and promoted the general prosperity.

This history was duplicated in the south-central and southern sections as the discovery and development of gas extended southward. In Charleston, Huntington, Spencer, Glenville, Point Pleasant, St. Albans, Kenova, and many other places in the gas-producing counties gas likewise became the universal and exclusive fuel, and the use thereof brought to pass the like development and growth of population, wealth and general prosperity (Rec., 1117 *et seq.*).

From this it followed that the domestic life and the business of a majority of the people of West Virginia were and are modified and their adjustments made with reference to the continued use of gas as fuel; and gas in reasonably adequate quantities for domestic and industrial use became, was and is a necessity throughout the greater part of the State.

According to the United States Geological Survey statistics for 1918 (Rec., 1566, insert p. 145, Pa. Exhibit No. 45), the West Virginia gas consumers in that year were divided into 127,168 domestic and 1,873 industrial users. The domestic users in 1919 were 130,780 (Rec., 849). Estimating, as is usually done, an average of four and one-half or five persons in the family of each domestic consumer, would show from 585,000 to 650,000 West Virginians dependent on domestic service alone.

Rights and Special Privileges of Gas Companies.

From the inception of the industry West Virginia adopted and maintained a policy of liberality toward the natural-gas industry, and especially toward those persons and corporations engaged in marketing to the public. No restrictions, such as prevail in some other States, were imposed; there was no limitation as to the area of gas territory which might be held, the number of wells which might be drilled, or the amount of gas which might be taken from the common gas pools. No restrictions were imposed upon the pressure at which gas might be extracted from the wells or maintained in the transporting lines, or upon the purposes for which it might be taken and used. And even an early statute, constituting the natural-gas pipe lines common carriers, fell into innocuous desuetude in view of the full and satisfactory supply.

To those engaged in the public service of gas, the State extended broad charter powers and gave special rights and privileges, including the power of eminent domain, without which the construction of the great pipe-line systems hereinafter mentioned would not have been possible. This power was often exercised, and where not exercised was obviously potential in negotiations for the purchase of rights of way for pipe lines and other facilities. County courts granted to them franchises for the free use of the public highways, upon and along which they constructed and maintain pipe lines, boxes, connections, and telegraph and telephone lines. Under like franchises from cities and towns they were given and enjoyed the like use of streets and alleys. The various pipe lines for gathering, transmission and service of gas spread in a network, not unlike a spider's web, over the gas

fields and gas producing counties. And while its liberal policy toward those engaged in the public service of gas was primarily dictated by the motive to provide for its own people, West Virginia was not illiberal toward consumers in other States. No program of conservation was adopted or attempted, nor were efforts made to restrict the enormous and continually increasing volume of gas which, in later years, certain of its public service corporations transported, or sold for transportation, to consumers in other States. The right of these public service corporations so to dispose of their surplus in other States was not only recognized, but substantially sanctioned by permitting them to exercise the power of eminent domain for the construction of pipe lines transporting chiefly for foreign consumption, subject only to the duty of first serving West Virginia consumers in the territory through which such lines extended.

Gas Shortage in West Virginia.

Until the winter of 1916-1917, all consumers in the State were adequately served. The extent of the West Virginia fields and the quantity of production until that time were greater than ever before known in the gas industry. The supply in the hands of the public utilities, produced within the State, was at all times from four to five times greater than the total amount used by the domestic and industrial consumers of the State (Rec., 996). Under these circumstances West Virginia and its gas consumers rested in security.

In the winter of 1916-1917, however, the people of West Virginia were rudely disillusioned. Early in that winter began an inadequate service of gas, which, by midwinter, developed into an extensive shortage (Gov. Cornwell, Rec.,

1194-5; 1139 *et seq.*, 1223-4; 1343-1345). In an effort to meet the situation, and under a rule of the West Virginia Public Service Commission, all industrial gas was shut off; but yet the supply was inadequate to warm the homes of domestic consumers. For a long period of extremely cold weather, the shortage deprived dwelling-houses, hotels, stores, and public and private buildings of sufficient heat, and in some instances, of any heat. In the homes and hotels, cooking was prevented, and in many cases illness was caused or accentuated by the cold. Public schools were closed and churches compelled to forego their customary exercises. Factories were shut down with great loss to their owners, and their workmen thrown out of employment. An extreme example was the State Tuberculosis Sanitarium, at Terra Alta, where the supply failed utterly, and in order to keep the patients from freezing, the officials were compelled in zero weather to build fires and erect stoves with funnels of stovepipe projecting from the windows (Rec., 1153). The State Penitentiary at Moundsville in Marshall county, the West Virginia University at Morgantown in Monongalia County, the State Hospital for Insane at Weston in Lewis County, the Industrial School for Girls at Salem in Harrison county, and the Industrial School for Boys at Pruntytown in Taylor county, all State institutions, situate within developed gas territory, were likewise affected and driven to the use of other fuel. Distress or inconvenience to domestic consumers, and the shutting down of industries, occurred practically in all sections of the State where gas was used, from the northern Panhandle southward to Charleston (Rec., 1195). The severity was as great in the sections lying in the most prolific fields as elsewhere.

Causes of Shortages.

The causes of this gas shortage are not far to seek. The various statements in the record, too numerous and intricate to set out in detail, and not capable of precise reconciliation in some instances, concur in showing that the shortage in West Virginia, was and is due to the enormous volumes of West Virginia gas exported to other States by certain public service corporations of West Virginia, and the consumption of that gas in the other States without regard to present or future needs of West Virginia, or the duties of the exporters to the latter State.

The earliest figures available are for the year 1908. The following, from reports of the United States Geological Survey (Rec., 1603), shows the total amounts exported from West Virginia to and including the year 1919 as compared with the total production of the State:

Year.	Total production.	Exported from State.	Per cent.
	M cu. ft.		
1908	112,181,278	61,644,618	55
1909	166,435,092	96,074,387	58
1910	190,705,869	120,508,811	63
1911	206,890,576	132,867,059	64
1912	239,006,682	151,144,250	63
1913	245,453,985	155,501,876	63
1914	236,489,175	150,161,936	63
1915	244,004,159	154,630,164	63
1916	299,318,907	200,004,740	67
1917	289,898,967	196,679,263	68
1918	280,289,044	174,664,650	62
1919	219,886,837	139,939,062	64

But while, for example, in 1916 the total production of the State by all operators and for all purposes was 299,-318,907 M cubic feet, and there was in the hands of the public-service corporations of the State a net supply of 259,414,200 M cubic feet available for service to the public and disposed of by said corporations (Rec., 992), yet of this latter volume the total served to all West Virginia consumers was only 59,409,460 M cubic feet, or 22.9 per cent. The figures for nine years show that the maximum used by West Virginia consumers never exceeded 25.6 per cent of the net supply so available for public service (Rec., 996)*:

Year.	Net supply for public service.	Sales to W. Va. consumers.	Per cent to W. Va. consumers.	Per cent exported.
	M cu. ft.			
1911	173,132,353	40,265,294	23.3	76.7
1912	203,112,738	51,968,488	25.6	74.4
1913	209,131,295	53,629,419	25.6	74.4
1914	200,762,645	50,600,709	25.2	74.8
1915	207,777,882	53,147,718	25.6	74.4
1916	259,414,200	59,409,460	22.9	77.1
1917	245,620,686	48,942,388	19.9	80.1
1918	227,649,823	52,985,173	23.3	76.7
1919	183,687,047	46,654,098	25.4	74.6

***Statistics on Production and Consumption.*—In the statistics, West Virginia has used as a basis the net supply available for service to the public. Before the gas is available for public use, the producer must deliver to the landowner the free-gas service uniformly reserved in gas leases as part of the rental, the ordinary individual consumption whereof has largely exceeded that of the average domestic consumer, and the aggregate amount of which has been very considerable.

Of the gas thus available for public service, a proportion ranging from 80.3 per cent to 91 per cent, has, by the means hereafter explained, been controlled by the seven companies later mentioned, the quantities and percentages being as follows (Rec., 996):

Large quantities of gas are consumed for field purposes, namely, for fuel used in drilling and cleaning out wells, the operation of compressor or pump stations to transport the gas, and the various other purposes necessary to the production and transportation of gas to market. The quantities so used amount to approximately 7 per cent of the annual production (Rec., 949, 989, 990, 992).

Again, in West Virginia, as in other States, certain producers (consisting for the most part in West Virginia of carbon-black manufacturers, but also including a few other industries) hold and produce gas from their own territory and for their own consumption and are not public-service corporations (Rec., 989, 990, 992).

None of the free gas delivered in payment for leases, nor that used for field purposes or consumed by such private enterprises, reaches the public. To include the free or field gas as a part of the West Virginia consumption would at once charge West Virginia consumers with what they do not in fact receive, and at the same time free consumers in other States from the proportion chargeable to the production and transportation of the much greater quantities of exported gas. The total of these three items in the past ten years has averaged approximately 15 per cent of the annual production. (See statistics, Rec., 992.) This gas should be eliminated from the public gas-service gas supply, thus confining the statistics and discussion to the remaining 85 per cent as the net supply of the public-service corporations available for service (*Pittsburgh & W. Va. Gas Co. vs. Nicholson* (W. Va.), 105 S. E., 784). Statisticians for the plaintiffs, however, include these three items in the supply of West Virginia consumers, and thereby have produced percentages to show that they use more gas *per capita* than the consumers in other States (Rec., 899-901; 948-950).

Year.	Net supply for public service.	Net supply of seven companies.	Per cent.
	M cu. ft.		
1911	173,132,353	147,431,246	85.1
1912	203,112,738	172,050,962	84.7
1913	209,131,295	167,897,746	80.3
1914	200,762,645	166,625,730	83.0
1915	207,777,882	170,694,495	82.1
1916	259,414,200	220,892,583	85.1
1917	245,620,686	223,517,777	91.0
1918	227,649,823	201,685,702	88.6
1919	183,687,047	164,426,341	89.5

And out of the abundance of the supply of the seven companies, the proportion granted to West Virginia consumers extended from 11 per cent to 17.9 per cent, as shown by the following (Rec., 997):

Year.	Net supply of the seven companies.	Sales to West Virginia consumers.	Per cent.
	M cu. ft.		
1911	147,431,246	17,200,747	11.7
1912	172,050,962	21,101,443	12.3
1913	167,897,746	22,297,677	13.3
1914	166,625,730	20,612,599	12.4
1915	170,694,495	18,860,867	11.0
1916	220,892,583	24,526,859	11.1
1917	223,517,777	26,889,876	12.0
1918	201,685,702	30,120,273	14.9
1919	164,426,341	29,360,811	17.9

The entire balance of their net supply for these years was marketed by the seven companies for consumption in other States.

The Seven Companies.

We desire to emphasize again that the statute in question applies equally to all public-service gas companies. But it is nevertheless true that the marvelous disparity of the gas supply to West Virginia and the manifest discrimination against it in the distribution of its own product were brought about by the seven public-service gas corporations (in practical interest and effect, five only), whose rights are so strongly sought to be vindicated by the plaintiffs. And this was effected by the domination by the seven companies of the major part of the gas territory and gas supply of the State, vesting in them a virtual monopoly, and by the enormous sales of West Virginia gas for consumption in other States, already evidenced by the statistics above presented. While, therefore, the seven companies have not been singled out for hostile legislation, their relation to the present litigation and to the West Virginia gas shortage require special mention of their circumstances.

The seven companies, either in their original form or in the aspect later assumed by them, were and are, the Hope Natural Gas Company, Reserve Gas Company, Pittsburg & West Virginia Gas Company, Carnegie Natural Gas Company, Manufacturers Light & Heat Company, United Fuel Gas Company, and Columbia Gas & Electric Company. While seven in number and referred to throughout these causes as "the seven companies," they are, in effect, only five in interest and operation, because of the identity of control of the Hope Natural Gas Company and the Reserve Gas Company and of the United Fuel Gas Company and the Columbia Gas & Electric Company.

The Hope Natural Gas Company is wholly owned, and the Reserve Gas Company is controlled, by Standard Oil Company of New Jersey (Rec., 322); the minority stockholding of the Reserve is presently owned by Union Natural Gas Corporation, a holding corporation controlling a number of companies engaged in producing and marketing natural gas to various cities in Ohio (Rec., 323); Carnegie Natural Gas Company is a subsidiary of the United States Steel Corporation (Rec., 925, 926, 937); Pittsburg & West Virginia Gas Company is a subsidiary of the Philadelphia Company of Pennsylvania (Rec., 509-513), a holding company with a number of other subsidiaries engaged in producing and distributing natural gas and owning and operating the street-railway system of Pittsburgh and various other large enterprises; the Manufacturers Light & Heat Company is a merger of some twenty to twenty-five companies formerly in the natural-gas business in Pittsburgh and many municipalities of Western Pennsylvania, and also along the Ohio River in West Virginia and Ohio (Rec., 1029), and the United Fuel Gas Company is presently owned by the Columbia Gas & Electric Company and Ohio Fuel Supply Company (Rec., 378-379), the former owning or controlling the lighting and heating systems in Cincinnati, Covington and other cities in Ohio and Kentucky, in addition to producing and distributing gas elsewhere, and the Ohio Fuel Supply Company being a producing and marketing company in Ohio, selling gas to consumers and local gas companies in Ohio.

Legal Status of the Seven Companies.

All of these seven companies were chartered or authorized to carry on business in West Virginia in the light of the following pre-existing statute (Code, ch. 53, Sec. 8; Acts of 1882, ch. 96):

> "And the right is hereby reserved to the legislature to alter any charter or certificate of incorporation hereafter granted by a joint stock company and to alter or repeal any law applicable to such company."

The nature of these companies, when the Act of 1919, now in contest, was passed is amply set forth in the record, from which we summarize the following:

(1) All seven companies were and are public-service gas corporations of West Virginia. Five of them, the Hope Natural Gas Company, Reserve Gas Company, Pittsburg & West Virginia Gas Company, United Fuel Gas Company, and Columbia Gas & Electric Company, were chartered under the laws of West Virginia. The Manufacturers Light & Heat Company and Carnegie Natural Gas Company were chartered under the laws of Pennsylvania, but, as a condition precedent to doing business in West Virginia necessarily received from the State authorization to do business under the laws applicable to domestic corporations, and became and were, to all intents and purposes, domestic corporations, insofar as concerned their property, business, rights and duties in the State (Rec., 1885; Code W. Va., ch. 54, Sec. 30). In addition, substantially all the gas territory, leases, pipe-line systems, rights of way, franchises, and other property of the

Manufacturers Light & Heat Company in West Virginia were acquired by absorption of the Wheeling Natural Gas Company and other public-service corporations theretofore chartered and serving the public under the laws of West Virginia (Rec., 63, 69, 1029).

The substance and effect of the charters of these seven companies, set forth with varying degrees of elaboration in their respective condemnation proceedings, sufficiently evidence their character. Thus the Reserve Gas Company and the Hope Natural Gas Company both allege (W. Va. Exs. Nos. 45 and 46, Rec., 1803, 1822) that their charter powers include:

> "The producing, dealing in, buying and selling, acquiring, storing, transporting by pipes and otherwise natural gas for its own use and for the selling and supplying of natural gas for industrial, commercial, domestic and other public and private uses for heat, light, fuel and power to persons, firms, partnerships, corporations and other consumers and other municipalities and places in the State of West Virginia as well as elsewhere, where the said natural gas may be discovered, purchased, stored or transported by the said * * * Gas Company," * * *

and

> "Also to have, exercise and enjoy the right of eminent domain, and in the exercise of such right to take, condemn, use and enjoy such lands, rights of way, easements and property as shall be necessary to enable it to lay and construct its mains, pipes and conduits, pump stations, telegraph and telephone lines, dams and other structures and appliances necessary and required or convenient to the producing, storing, cooling and transporting of natural gas."

And, though not enforced, the public character of natural-gas pipe lines has been declared in West Virginia since the year 1891, under the provisions of its Code, Chapter 52, Section 24, extending the power of eminent domain to companies organized for the purpose of transporting such gas, and declaring that

> "Such company shall for the purpose of transporting natural gas, oils and water be considered and held to be a common carrier, and subject to all the duties and liabilities of such carrier under the laws of this State."

(2) The seven companies, and the constituent companies absorbed by them, pursuant to their charter powers, engaged in the service of natural gas to the people of West Virginia, and have at all times since served a large number of its people. They have acknowledged their character as public-service corporations, and as such have filed their tariffs and schedules before the West Virginia Public Service Commission and accepted the rates and regulations prescribed by that body (Rec., 1365, 1922-1943). From the application of the Hope Natural Gas Company, the largest of the seven companies, for leave to increase rates (W. Va. Ex. No. 53, Rec., 1923), we quote as an example the following typical averment:

> "That its principal place of business is in the following towns where it distributes natural gas and in the neighboring country districts and villages, viz: Belmont, Clarington, Colliers, Eureka, Fairview, Friendly, Glovers Gap, Littleton, Lima, Lost Creek, Mt. Clare, Mannington, Metz, Minora, Parkersburg, Paden City, Pine Grove, St. Marys, Sistersville,

Smithfield, Williamstown and Wileyville, West Virginia, and that it is a public-service corporation engaged in the management and operation of a natural-gas plant in said cities and towns and that as such public-service corporation in the service of natural gas to the domestic consumer it is subject to the provisions of Chapter 9, Acts of the Legislature of West Virginia for 1913 and 1915 and of the Code of West Virginia applicable to this class of corporations."

(3) The service to West Virginia consumers so authorized and undertaken by the seven companies embraces gas for domestic, industrial, commercial and other purposes. The public professions of the Hope Natural Gas Company and Reserve Gas Company as to such service are exemplified by the following quotation from the printed form used in their applications to the courts of the State for leave to condemn for pipe lines (Rec., 1823, 1804):

> "That since the granting of said new or amended and modified charter or certificate of incorporation, as well as for several years before, petitioner has been and is engaged in the business of selling and supplying natural gas for industrial, commercial, domestic and other public and private uses for heat, light, fuel and power to persons, firms, partnerships, corporations and other consumers and purchasers for use in incorporated cities, towns, villages, districts and other municipalities and places in the State of West Virginia, and has been and is supplying natural gas to the public for fuel, illuminating and other purposes, and has been, and is still, at great expense and cost to it, erecting, laying, maintaining and operating pipes and lines of pipe, etc., for transporting natural gas with which to supply the public and said other

purchasers and consumers with natural gas for fuel, illuminating, heat, power and other purposes; and that it has been and is transporting natural gas to be supplied to the public and said other purchasers and consumers for fuel, heat, illuminating, power and other purposes by and through its said pipes and pipe lines."

The attitude of the Pittsburg & West Virginia Gas Company was expressed in the following language (Rec., 1843):

"1st. That petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of West Virginia, for the purposes of transporting carbon oil and natural gas, or both, by means of pipe lines, or otherwise, for public use; that petitioner is now engaged in the business of producing, transporting and selling natural gas for public use and is now producing large quantities of natural gas within the State of West Virginia, and is transporting the same to market by means of certain pipe lines constructed and maintained by it; that the natural gas so transported by said lines is being sold to the public in the following incorporated cities, towns and villages, to-wit: Grafton, Enterprise, Shinnston, Lumberport, Haywood, Colfax, Worthington, Simpson, Pruntytown, Blueville, Thornton and Flemington, all within the State of West Virginia, and other places in the State of West Virginia not incorporated and many persons not living in any city, town or village, are likewise being supplied with natural gas for domestic and industrial uses by this petitioner by means of its said system of pipe lines; that the transportation of said natural gas and the sale thereof is for the use of the public generally for the purpose of supplying light and heat to such pub-

lic; and that your petitioner is ready and willing at all times, and has so held itself out, to sell said gas to the public, or any portion thereof, upon the payment of a reasonable price therefor."

Substantially the same assertions and professions were de by the constituent and predecessor companies, Fairnt & Grafton Gas Company (Rec. 1896) and The Philaphia Company of West Virginia (Rec., 1857), while the rnegie Natural Gas Company uses language even broader Rec., 1876), containing the additional averment that it is common carrier of natural gas under the laws of West rginia.

(4) With respect to future consumption and extensions service for domestic, industrial and other uses of gas, the ven companies expressed their sense of obligation to West irginia consumers as follows:

The Pittsburg & West Virginia Gas Company and its redecessor, Fairmont & Grafton Gas Company, stated of ecord (Rec., 1843, 1896) that each was:

> "* * * ready and willing at all times, and has so held itself out, to sell said gas to the public or any portion thereof, upon the payment of a reasonable price therefor."

The Philadelphia Company of West Virginia, the other onstituent company of Pittsburg & West Virginia Gas Company, alleged (Rec., 1857):

> "Your petitioner is constantly increasing the number of its consumers and is desirous of largely increasing its sales of gas in the various counties of West

Virginia traversed by its lines. Your petitioner is ready and willing to sell gas to all parties within reaching distance of its pipe lines who apply for the same, at reasonable rates. Your petitiomer, being a public-service corporation, as hereinbefore stated, is ready and willing to furnish gas at all times to the public, as aforesaid."

The Carnegie Natural Gas Company alleged (Rec., 1876):

"Your petitioner is constantly increasing the number of its consumers and it is desirous of largely increasing its sales of gas in the various counties of West Virginia traversed by its lines. Your petitioner is ready and willing to sell gas to all parties within reaching distance of its pipe lines who apply for the same at reasonable fixed rates which are in general effect throughout the State of West Virginia, and which rate is as follows: 25 cents per thousand cubic feet of gas; also flat rate of $1.50 per month for one fire. Your petitioner, being a public-service corporation, as hereinbefore stated, is ready and willing to furnish gas at all times to the public, as aforesaid."

The Wheeling Natural Gas Company, the principal constituent through which the Manufacturers Light & Heat Company was doing business in West Virginia in the year 1906, alleged (Rec., 1905):

"That petitioner in the exercise of its rights, powers, and privileges and in the conducting of its business has been and is supplying the incorporated cities, towns, and villages of Benwood, Chester, McMechen, Moundsville, Newell, and other towns and

vicinities and manufactories within the State of West Virginia, and the inhabitants of said cities, towns, and villages, with natural gas, for heating, fuel, illumination, power and other purposes, under ordinances of said several cities, towns, and villages, as well as a large number of unincorporated towns and villages in the said State of West Virginia, and persons residing in and inhabiting such unincorporated towns and villages, and any and all persons residing along the lines of your petitioner, desiring natural gas."

The Hope Natural Gas Company, after an extensive enumeration of the various cities, towns, and communities in West Virginia served by it and its other public services of gas, alleged (Rec., 1825):

> "That petitioner, as is its bounden duty, furnishes, and is ready and willing to furnish, at uniform and reasonable rates, natural gas for heating, illuminating, fuel, power, and other purposes to every inhabitant of the several incorporated cities and towns above named who applies therefor, and complies with the regulations prescribed by the ordinances of such of said cities and towns as have fixed ordinances authorizing the same, and who complies with the regulations fixed by the council of such of said towns as have not a specific ordinance, and also furnishes and is willing to furnish all other consumers therewith, at uniform and reasonable rates."

The Reserve Gas Company stated its attitude in language substantially identical with that of the Hope Natural Gas Company in the quotation immediately preceding (Rec., 1805).

(5) With respect to their pipe lines, the public professions of the seven companies are found in their many applications for leave to condemn made to the courts in the gas-producing counties, specimens of which are exhibited in the record at pages 1802 to 1916. In substance these applications set forth their extensive service of gas to West Virginia consumers; the necessity of obtaining a greater supply for them and the drilling of wells for that purpose; the necessity of laying a pipe line or lines for the purpose of transporting such additional gas to said West Virginia consumers and of condemning over the particular land described, and that the construction of said pipe line is necessary for public use and the same, when constructed, will be so used. Thus the form of application used by the Hope Natural Gas Company and Reserve Gas Company alleged (Rec., 1826):

> "That it became necessary for petitioner in order to supply natural gas to the said several incorporated cities and towns, and their inhabitants, as well as the several other towns, individuals, firms, corporations, copartnerships, etc., for heating, fuel, illuminating, power, and other purposes, and to keep up the required and necessary supply of such gas, that it discover and produce an additional supply of natural gas; that to discover and produce the same, it became necessary for petitioner to drill, at large cost and expense, new wells for the purpose in the county of Harrison and several other counties in the State of West Virginia, and to acquire other wells in said counties; and that petitioner has drilled several new wells in said several counties and has discovered and found a large supply of natural gas in the said wells, and has acquired sundry other wells producing natural gas. That from said wells so drilled by it, as

well as from said wells so acquired by it, petitioner produces natural gas with which to supply the said incorporated cities and towns and the said inhabitants thereof, aforesaid, as well as said other purchasers and consumers. And that in order to supply said incorporated cities and towns and the inhabitants thereof, as well as other consumers and prospective consumers in Harrison County, and elsewhere, with such natural gas produced from said last-mentioned wells, for heating, illuminating, and other purposes, it is necessary that petitioner lay, construct, and maintain an additional line of pipe from some of the wells in said several counties, through a portion of said Harrison County and portions of other counties in the State of West Virginia, so as to reach the above-mentioned incorporated cities and towns, and the inhabitants thereof, as well as said other consumers in Harrison County and elsewhere, with said pipe line for the purpose of transporting such natural gas; and it is also necessary that petitioner transport such natural gas through said pipe line, and supply the same for said purposes to said incorporated cities and towns, and the inhabitants thereof, and said other consumers in said Harrison County and elsewhere."

(6) Further urging their public service to the people of the State, the seven companies applied for and were given, in addition to their franchises for use of the streets and alleys of the cities, towns, and villages in West Virginia served by them, the right to lay, maintain and operate pipe lines, connections, boxes, valves and other fixtures, as well as telephone and telegraph lines, along and upon the highways (Rec., 1016). A large part of their several pipe-line and transportation systems are thus constructed and now

used without charge or compensation whatsoever. For an example of the franchises for use of the public highways see W. Va. Ex. No. 52 (Rec., 1917), granting to Reserve Gas Company:

> "License and permission to lay and maintain in any of the public roads of this county pipe lines for the conveyance of gas from any well or wells of the said company, said pipe lines to be so laid as not to interfere with the use of said public roads and for that purpose to be covered with a covering of not less than twelve inches above said pipe line and also to be laid in such manner as not to interfere with any other pipe line, now laid in or along said road. If at any time, by reason *or* working the roads it should become necessary to lower said pipe, at any point, said company shall lower it at its own expense. This franchise is to expire in fifty years from the date hereof."

And in this connection it is pertinent to mention that many of these franchises, and special rights and privileges therewith, as well as the pipe lines constructed thereunder, were acquired by the seven companies through their absorption of local companies.

Gas Control of the Seven Companies.

As already shown, in 1919 the total gross production in the State by all producers was 219,886,837 M cubic feet, of which, after deducting the free gas to lessors, gas used in the field, and gas produced and consumed by private industries (which items do not reach or benefit the consuming public), there was a residue of 183,687,047 M cubic feet,

constituting the net supply in the hands of the public-service corporations of the State available for service to the public. Of this net public supply, the seven companies produced from their own wells or acquired under purchase contracts a total of 164,426,341 M cubic feet, or 89.5 per cent. The following table (Rec., 996, 997, 1736, insert p. 383) shows that the like control has existed since 1911:

Year.	Net supply for public service.	Net supply of seven companies.	Per cent.
	M cu. ft.		
1911	173,132,353	147,431,246	85.1
1912	203,112,738	172,050,962	84.7
1913	209,131,295	167,897,746	80.3
1914	200,762,645	166,625,730	83.0
1915	207,777,882	170,694,495	82.1
1916	259,414,200	220,892,583*	85.1
1917	245,620,686	223,517,777	91.0
1918	227,649,823	201,685,702	88.6
1919	183,687,047	164,426,341	89.5

But the control of the West Virginia gas situation by the seven companies is still further manifest.

The total acreage of gas territory, operated and unoperated, held under lease by all the sixty-seven public-service corporations of the State in 1919, was 2,725,798 acres, of which the seven companies together held 2,566,798 acres, or 93.8 per cent (Rec., pp. 1001-1003). For the years 1910 to 1919, the aggregate acreage of the seven companies was as follows (Rec., p. 1736; insert, p. 390):

*The figure 200,892,583, on record page 996, is a typographical error.

Year.		Developed.	Undeveloped.	Total.
1910	....	311,569	2,639,509	2,951,078
1911	....	351,428	2,382,846	2,734,274
1912	....	467,664	2,027,469	2,495,133
1913	....	533,593	2,055,968	2,589,561
1914	....	572,043	1,852,319	2,424,362
1915	....	509,414	2,045,032	2,554,446
1916	....	559,078	2,281,435	2,840,513
1917	....	618,559	2,152,500	2,771,059
1918	....	658,880	1,872,843	2,531,723
1919	....	689,305	1,866,720	2,556,025

In addition to the acreage directly held under lease, the seven companies indirectly controlled much other territory by means of purchase contracts for the gas production of a great number of oil companies and other independent producers. Thus, in 1919, of the 245 independent producers selling their gas to the 67 West Virginia public-service corporations, the seven companies acquired the production of 202 of such producers, holding oil and gas leases upon an aggregate of 1,316,807 acres, while the remaining 60 public-service corporations acquired the production of 43 of such operators, holding leases upon 11,394 acres (Rec., pp. 1471-1473).

The total number of producing gas wells in West Virginia at the beginning of 1919 (according to the United States Geological Report for 1918) was 9,687, of which the seven companies owned 7,086, or 73.2 per cent. The additional wells held under contracts with independent producers is not disclosed in the evidence, but a fair inference can be drawn from a consideration of the number and extent of territory of the independent producers from whom they

purchased, as stated in the preceding paragraph. The total of producing gas wells in the State and the number thereof owned by the seven companies during the years 1910 to 1919 was as follows (Rec., 1021):

Year ended Dec. 31—	Total, all producers.	Seven companies.	Per cent.
1910	4,052	2,890	71.3
1911	4,790	3,354	70.0
1912	5,604	3,897	69.6
1913	6,534	4,578	70.1
1914	7,194	5,037	70.0
1915	7,718	5,458	70.7
1916	8,542	6,161	72.1
1917	9,329	6,763	72.5
1918	9,687	7,086	73.2

Added to this control of the sources of supply, and accounting in a large degree for it, is the control of the gas markets built up by means of, and dependent on, the pipeline systems and the compressor stations essential for the transportation of gas to consumers at a distance from the place of production. These pipe lines and stations are themselves, in fact, a monopoly resulting from the command of the large capital, not available to everyone, required to erect them and from the holding of the large areas of gas territory and large amounts of gas production, tributary to the pipe lines and withdrawn by the seven companies from acquisition by others (Rec., 1016, 1279, 1310, 1329-1336, *et seq.*).

Nor is this situation altered by the statute, already quoted, of West Virginia, enacted in the year 1891 and yet in force,

providing that any company organized for the purpose of transporting natural gas by pipe lines should be considered and held to be a common carrier (Code W. Va., Chap. 52, Sec. 24). The seven companies at all times have refused to transport any gas except their own production and purchases, claiming that to do so would disable them from the public service of gas obligatory upon them as public-service corporations (Rec., 1425-1426). In this regard the situation is pertinently described by a short passage from *United States vs. Ohio Oil Co.*, 234 U. S., 548, 559, the language there used in relation to oil being equally applicable to gas:

> "Availing itself of its monopoly of the means of transportation the Standard Oil Company refused, through its subordinates, to carry any oil unless the same was sold to it or to them, and through them to it, on terms more or less dictated by itself. In this way it made itself master of the fields without the necessity of owning them, and carried across half the continent a great subject of international commerce coming from many owners, but, by the duress of which the Standard Oil Company was master, carrying it all as its own."

Methods of Acquisition of Control by the Seven Companies.

In the early days gas territory, both proven and prospective, was available for whomsoever desired to lease. The great majority of the local companies, serving many municipalities and communities in the gas-producing counties, obtained an abundant supply from wells in the immediate vicinity, and acquired only relatively small areas of gas. The seven companies, however, with the foresight and ability to

quire and hold for future realization, common to such mbinations of capital, acquired in the aggregate very rge areas of gas territory, much of it proven to be producte of gas, and much of it appearing to be valuable in ospect. Much of this acreage was acquired and held as reserve for future supply, and, although these reserves ve since been depleted to a considerable extent, the seven mpanies yet held in 1919 an aggregate of 1,866,720 acres undeveloped territory out of their total of 2,566,025 acres Rec., 1736; insert, p. 391).

A large part of the gas territory was obtained by direct ases from the land-owners, but the seven companies also quired a large part of their holdings by the acquisition of her West Virginia public-service gas corporations engaged the marketing of natural gas, thus eliminating the compeion of the latter companies and depriving them of their ility to supply the West Virginia public. This was particurly true of the Hope Natural Gas Company, the last of the ree gas subsidiaries of the Standard Oil Company in West irginia, which from time to time took over all of the andard gas interests in northern and north-central West irginia theretofore developed and marketed by four other bsidiaries, the South Penn Oil Company, Carter Oil Comny, Flaggy Meadow Gas Company, and Mountain State as Company (Rec., 322, 340-342 *et seq.*, 1173, 1329). he first two were extensively engaged in the oil business and eld, especially the South Penn, very great acreages of oil d gas leases in many counties, and in the course of oil plorations had encountered and held many gas wells, hile the last two companies were chartered and operated West Virginia public-service corporations for the purpose

of marketing the gas so developed, the Flaggy Meadow Gas Company serving consumers in various municipalities of Marion, Harrison, and Wetzel counties, and the Mountain State Gas Company serving consumers in municipalities of Harrison, Lewis, Doddridge, Wood, Pleasants, Tyler, and possibly other counties. In this manner the gas territory, wells, pipe lines and other property of the other oil and gas subsidiaries passed into the hands of the Hope Natural Gas Company and formed part of, and a large nucleus around which were acquired and built up, its present system and immense holdings. In 1910, the Hope Natural Gas Company also purchased all of the gas territory, wells, pipe lines and gas-purchase contracts of the Wheeling Natural Gas Company and Tri-State Gas Company, both West Virginia public-service corporations, in Harrison, Lewis, Gilmer, Upshur, Baxton, and part of Marion County (Rec., 1169-1172), in return for a gas-sales contract to the Manufacturers Light & Heat Company, which had theretofore acquired control of the Wheeling and Tri-State Companies (Rec., 1712). And to this day the Hope Natural Gas Company in northern West Virginia and the United Fuel Gas Company in the southern section receive substantially all the wells, or the gas from wells, discovered by these two large oil companies (Rec., 999, 1019, 1445-7, 1467 *et seq.*), which together hold in West Virginia 800,616 acres of oil and gas leases (Rec., 1467-1470).

The Pittsburg & West Virginia Gas Company was originally incorporated under the laws of West Virginia as the Fairmont & Grafton Gas Company. It was one of the largest and earliest public-service corporations in the northern section of the State, serving Fairmont, Grafton, Shinns-

on, Lumberport, and other municipalities in Marion, Taylor and Harrison counties and having a very considerable acreage of gas territory, with many wells and pipe lines through those counties (Rec., 512-513, 1895-1898). In 1906 its capital stock was acquired by The Philadelphia Company of Pennsylvania, which had heretofore entered the State through a West Virginia subsidiary chartered as The Philadelphia Company of West Virginia, and acquired territory, drilled wells, built pipe lines and engaged in the marketing of natural gas as a public-service corporation of the State. These two subsidiaries were connected and thence operated as one until 1913, when the name Fairmont & Grafton Gas Company was changed to Pittsburg & West Virginia Gas Company, and to it the property of The Philadelphia Company of West Virginia was turned over (Rec., 512).

The Manufacturers' Light & Heat Company entered West Virginia through the acquisition of all or the controlling interest in the capital stock of West Virginia public-service corporations, whose property and marketing systems were thereupon connected with its general system. The companies so acquired were Wheeling Natural Gas Company, Ohio Valley Gas Company, Wetzel Gas Company, Tri-State Gas Company, Cameron Gas & Oil Company, New Cumberland Water & Gas Company, and Manufacturers' Gas Company of Wheeling; and until about 1910 all were operated as subsidiaries (Rec., 1029). In that year, all their outstanding stock having been acquired, they were merged into the parent company, which then for the first time formally entered the State (Rec., 65, 94).

In the southern section of the State the United Fuel Gas

Company, a West Virginia corporation, was chartered in 1903 and leased a considerable gas territory. Until 1915 its stock was owned by the Standard Oil Company and Ohio Fuel Supply Company, the Standard having control. Its chief expansion came in 1909 with its acquisition of the United States Natural Gas Company, a West Virginia corporation, which was itself a merger of a number of earlier West Virginia companies holding large acreages and engaged in the service of Charleston, Huntington and many other cities and municipalities in the southern section; and it also took over a great block of leases in that section from the Hope Natural Gas Company. In June, 1915, the Standard Oil Company disposed of its controlling stock interest in the United Fuel Gas Company to the Columbia Gas & Electric Company, and since then the two latter companies have been substantially operated together and under the same management (Rec., 386 *et seq.*; 1029-1033).

Contracts for the purchase of gas from independent operators were another means of engrossing the gas supply. But affording a powerful, and, in many cases, a compelling leverage in the negotiation of sales to the seven companies were the pipe-line systems and latterly the compressor stations. As the cost of pipe lines was practically prohibitive to the independent producer—and much the more so to the landowner himself—and as the independent producer and landowner could not hold their gas for future development or investment, because it was apt to be drained away through wells drilled on neighboring lands, operated by one of the seven companies, their only course was, in general, to sell or lease their gas to one of the seven companies upon terms and conditions made by it.

The pipe-line systems thus became the market for the independent producers, substantially all of whom sold to the seven companies. The same liability to loss by drainage through neighboring wells likewise deterred independent operators and local public-service corporations from taking up and carrying leases for future development or investment, while the landowner, moved by the same considerations, could not withhold his land from leasing. Thus the seven companies were enabled at once to discourage competitive leasing and to build up their reserves and control of the available territory. Nor was this condition changed by the subsequently increased demand for gas and increased prices paid therefor in many of the West Virginia cities located in the gas territory; for, insofar as the gas was not held by the seven companies, the increased demands and prices were met and overcome by the increased cost of transportation, due to the decline in rock pressure to the point where the gas ceased to be self-transporting, thus necessitating the additional and prohibitive cost of compressor stations (Rec., 1251-1257, 1269, 1270, 1300, 1330-1334, 1339-1340, 1346, 1359).

In the case of the oil companies which are included in the category of independent producers, even if possessed of the means to build and operate pipe lines and compressors, the scope of the enterprise and the proximity of the pipe lines have occasioned the same result. Such companies incidentally discovering gas while operating for oil, but not being engaged in the business of transporting gas, their only market has generally been the pipe lines of the seven companies in the vicinity of production.

Substantially all the oil companies sell their gas produc-

tion to the seven companies, and many of them operate upon an extensive scale and hold large acreages. For example, the South Penn Oil Company, Carter Oil Company, Ohio Fuel Oil Company and Pure Oil Company (formerly Ohio Cities Gas Company), Commonwealth Petroleum Company, Fisher Oil Company and Southern Oil Company, all of which sell to the seven companies and most of which are allied in interest with them, together hold 1,147,637 acres, primarily for oil development, but upon which gas is frequently discovered (Rec., 998, 1467-1474).

Exports of the Seven Companies.

We have already set forth the volume and proportions of West Virginia gas exported from the State, as given by the United States Geological Survey reports, showing the great preponderance of the exports. But confining the calculation, for the reasons already explained, to the net amount of gas available for public use, the percentage of exports is still greater, ranging from 74.4 per cent to 80.1 per cent as exhibited by the following tabulation (Rec., 996):

Year.	Net supply for public service. (M cu. ft.)	Sales to W. Va. consumers. (M cu. ft.)	Per cent to W. Va. consumers.	Per cent exported.
1911....	173,132,353	40,265,294	23.3	76.7
1912....	203,112,738	51,968,488	25.6	74.4
1913....	209,131,295	53,629,419	25.6	74.4
1914....	200,762,645	50,600,709	25.2	74.8
1915....	207,777,882	53,147,718	25.6	74.4
1916....	259,414,200	59,409,460	22.9	77.1
1917....	245,620,686	48,942,388	19.9	80.1
1918....	227,649,823	52,985,173	23.3	76.7
1919....	183,687,047	46,654,098	25.4	74.6

And as it is to be borne in mind that almost all of the public-service gas supplied by the local gas companies is supplied to West Virginia consumers, and that this gas is credited to West Virginia in the last preceding figures, it is apparent that the exports are to be attributed, almost in entirety, to the seven companies. And the true comparative treatment of consumers in West Virginia and elsewhere is to be found in apportionment of the gas of the seven companies. The following statement (deduced from the tabulation at Rec., 997) shows that of the West Virginia gas of the seven companies from 82.1 per cent to 89 per cent went to other States in the nine years from 1911 to 1919:

Year.	Net supply of seven companies.	Amount exported.	Per cent.
	M cu. ft.		
1911	147,431,246	130,230,499	88.3
1912	172,505,962	150,949,519	87.7
1913	167,897,746	145,600,069	86.7
1914	166,625,730	146,013,131	87.6
1915	170,694,495	151,833,628	89.0
1916	220,892,583	196,365,724	88.9
1917	223,517,777	196,627,901	88.0
1918	201,685,702	171,565,429	85.1
1919	164,426,341	134,065,530	82.1

Circumstances of Gas Exports.

Although limited quantities had been from early days marketed along the border lines from West Virginia into Ohio and Pennsylvania, and *vice versa*, especially in the Northern Panhandle of West Virginia, the business of exporting seems not to have reached an extensive scale until about the period from 1902 to 1905. At and for some years

before that time the defined gas fields of West Virginia afforded not only a large surplus over and beyond the demands of its people, but explorations had indicated the probability of the extension of productive territory to the southward (Rec., 322). In the meantime the gas fields of western Pennsylvania had been developed and utilized generally for domestic and industrial fuel at an earlier date and to a larger extent than those of West Virginia, chiefly by reason of the larger cities and population and the greater quantities consumed by the steel plants and other industries of Pittsburgh and that section of Pennsylvania. These fields began to decline and their production became insufficient to supply Pennsylvania consumers. In like manner the smaller and somewhat scattered gas fields of Ohio, never sufficient to supply more than a small part of the local consumers, also began to decline; in addition to which there were in Ohio many large cities and centers of industry served by local plants with artificial gas, to which the more efficient fuel of natural gas was attractive (Rec., 60-63, 438, 521-524, 543-557, 699, 719, 726, 749, 947). And thereupon commenced the process of expansion of the West Virginia gas industry, which later assumed the proportions of wholesale exploitation.

In securing markets in the other States, the financial resources of the seven companies and their allied or controlling interests played an important part. Thus the deficiency in its own supply in Pennsylvania provided a direct and ready market for the supply of the West Virginia companies acquired by the Manufacturers Light & Heat Company; the Carnegie Natural Gas Company had only to extend its lines through West Virginia to the Pennsylvania line to connect

with its system in that State and market its surplus production into the steel plants of its parent company, the United States Steel Corporation; and the Pittsburg & West Virginia Gas Company, or its predecessor companies of earlier years, all owned by The Philadelphia Company, laid lines to the Pennsylvania border and there sold and delivered its surplus to the Equitable Gas Company, another subsidiary, which in turn transported to and supplemented the waning supply of the various other subsidiaries marketing to Pittsburgh and elsewhere in western Pennsylvania.

The West Virginia companies owned or controlled by the Standard Oil Company, viz., the Hope Natural Gas Company and the Reserve Gas Company, adopted a somewhat different method. The gas was sold under long-term contracts and delivery made at the State line to purchasing companies in Ohio and Pennsylvania, which laid lines from the interior of said States to the West Virginia boundary and thence transported and sold the gas, in some instances directly to consumers, but in the majority of cases to local distributing companies, generally subsidiaries, which in turn distributed to consumers in Ohio, Pennsylvania, and as far west as Indiana. In part, these purchasing companies were theretofore engaged in the natural-gas business in said other States and had established markets, as was the case with the Peoples Natural Gas Company, a producing and marketing company in Pennsylvania, acquired by the Standard Oil Company in 1903 (Rec., 424), and also with the Manufacturers Light & Heat Company, which had extensive markets in Pennsylvania and with which the Hope Natural Gas Company contracted in 1910 for future deliveries of large quantities of gas, substantially all of which went to Ohio and Pennsylvania consumers.

In another part, markets were created by the incorporation of subsidiaries of the larger interests controlling certain of the seven companies, which subsidiaries constructed pipe lines to the West Virginia border and transported the gas there purchased and received from the West Virginia companies to municipalities in Ohio, Indiana and Kentucky not theretofore using natural gas. This last was the case with the East Ohio Gas Company, an Ohio corporation organized by the Standard Oil Company, which first acquired the franchises and distributing plants of the artificial gas companies serving the cities of Akron and Canton, in the State of Ohio, and thereupon built pipe lines to the West Virginia State line to receive deliveries from the Hope Natural Gas Company, also a subsidiary, and transported and served the gas there received to consumers in the last-mentioned cities through the distributing plants so acquired, in lieu of artificial gas, and also distributed to consumers in other municipalities in the territory through which its pipe lines were constructed; and still later these lines were extended to Cleveland, where also the artificial-gas plants and distributing systems were acquired through a deal in which the Columbia Gas & Electric Company became the minority stockholder of the East Ohio Gas Company. So also the use of West Virginia gas was introduced into Cincinnati and other cities in Ohio and Indiana, as well as into Louisville and Covington and other municipalities in Kentucky, while further supplies from West Virginia were used to supplement the insufficient production of local companies theretofore serving Dayton, Columbus, Springfield, Toledo and other cities of Ohio and Indiana.

The various transporting, distributing, subsidiary and

allied corporations involved in the contracts and arrangements under which transportation and service was made, and the numerous cities and municipalities included in the upbuilding of these markets and the supplementing of markets insufficiently served, in the States of Ohio, Pennsylvania, Kentucky and Indiana, are too numerous and complex to justify further detail here. It suffices to say that between the year 1908 and the winter of 1916-17, when the shortages to West Virginia consumers commenced, the seven companies, in addition to the large amounts directly transported out of the State by certain of them, delivered an enormous aggregate of natural gas from the West Virginia fields to many purchasing companies, who transported and sold the same, either directly or through other companies, to consumers in municipalities and communities in Ohio, Pennsylvania, Kentucky and Indiana, under contracts severally made by the seven companies with the other companies to whom they delivered the gas.

Gas-Sale Contracts.

The gas-sale contracts above mentioned were and are as follows:

The *Hope Natural Gas Company* so contracted with the following:

1. The Northwestern Ohio Natural Gas Company, which serves Toledo and other cities in Ohio (Rec., 1509). This contract covers the majority share of the production of the Reserve Gas Company, which is sold or taken over by the Hope Natural Gas Company, its allied company. The re-

maining exportation of the Reserve Gas Company is sold and delivered by its other stockholder, the Union Natural Gas Corporation, to its subsidiary, the Logan Natural Gas & Fuel Company, which serves or sells to local companies serving Athens, Chillicothe, Dover, Logan, Newark, Dayton, and other municipalities in Ohio, and Richmond, Muncie and other places in Indiana (Rec., 749 *et seq.*).

2. The Peoples Natural Gas Company, which serves a portion of Pittsburgh and other cities in Western Pennsylvania (Rec., 1524).

3. The East Ohio Gas Company, which serves Akron, Dayton, Cleveland and other cities in Ohio (Rec., 1544).

4. The River Gas Company, which serves Marietta and other Ohio cities (Rec., 1554), this contract being made by the Mountain State Gas Company and subsequently assumed by the Hope Natural Gas Company on its taking over the former company.

5. The Fayette County Gas Company, which serves Uniontown, Connellsville, and other cities in Western Pennsylvania (Rec., 1560).

The *Pittsburg & West Virginia Gas Company* so contracted with the Equitable Gas Company, which serves consumers in Pittsburgh and other cities in Western Pennsylvania (Rec., 1729).

The *United Fuel Gas Company* so contracted with:

1. The Louisville Gas & Electric Company, which serves the City of Louisville, Kentucky, and vicinity (Rec., 1738).

2. The Portsmouth Gas Company, which serves the City of Portsmouth, Ohio (Rec., 1745).

3. The Central Kentucky Natural Gas Company, which serves Frankfort and other municipalities in Kentucky (Rec., 1752).

4. The Ohio Fuel Supply Company, which serves Columbus, Cincinnati, Toledo, Zanesville and other Ohio municipalities (Rec., 1761).

5. The Columbia Gas & Electric Company, which serves Cincinnati, in Ohio, and Covington, in Kentucky, and their vicinities (Rec., 1791).

In addition to the foregoing, there were and are a number of similar contracts for sales and deliveries within the State of West Virginia of large quantities of gas by certain of the seven companies to others of the seven, the major portion of which deliveries is either transported and sold directly, or sold and delivered to other companies at the State line under the contracts above listed, which transported to consumers in Ohio, Pennsylvania and Kentucky. Thus the Hope Natural Gas Company so contracted with the Manufacturers Light & Heat Company for a large supply, the major portion whereof the latter company transports and markets in Pennsylvania, with a small part in Ohio and another small part in West Virginia (Rec., 1712). The United Fuel Gas Company so contracted with the Hope Natural Gas Company (Rec., 1769, 1776, 1777) and with the Pittsburg & West Virginia Gas Company (Rec., 1780-1788), which vendee companies in turn sell and deliver the major portion

of the quantities so purchased to other companies at the State line under the contracts above mentioned.

These contracts contain a number of provisions more or less common, though in varying language. Among the most important in their bearing on this litigation may be pointed out the provision, found in most of them, that the amount of gas delivered shall be sufficient to supply all the then domestic consumers of the purchasing companies, as well as all those which may be thereafter acquired, throughout the term of the contracts, together with a frequently added covenant by the purchasing companies to use their best efforts to extend their service; the provision for payment for the gas in the form of a percentage of the gross receipts of the purchasing companies from their consumers, thus directly interesting the vendor companies in the marketing in other States; and especially the provision whereby the vendor companies are compelled to deliver the contract quantities in preference to all other purchasers or consumers, save only the domestic consumers of the vendor company then on its lines in West Virginia, thereby disabling themselves from serving gas for the other public uses of heating and lighting schools, churches, hotels, hospitals, municipal and other governmental buildings, and all industrial use. (See, for example, Rec., 1533, 1546). And in this connection it is important to remark that all of the companies purchasing from the seven companies market a portion of the gas for industrial use, and that, as we shall later observe, the contracts of purchase contemplate industrial consumption by consumers of the distributing companies.

Pipe Line Systems and Commingling of Gas.

The gas of the seven companies going to Ohio, Pennsylvania and other States is transported by, and delivered out of, their general pipe-line systems. These systems, which are more or less welded into one by the connections of the seven companies among themselves, constitute a vast reservoir, both to receive gas and to transport and distribute it. Throughout the gas-producing counties, from the interior of the State to its boundaries, the gas is fed into the main pipe lines by smaller lines leading mediately or immediately from the wells, and gas is fed out through distributing lines leading to the consumers or communities served along the lines. Whether consumed in West Virginia or in other States, the gas is commingled and carried in the same trunk lines. And the process of feeding in by gathering lines and feeding out by distributing lines continues substantially to the limits of the State.

When fed into the pipe-line system from a particular well, or from wells in a particular section, the gas is at once commingled into a common and homogeneous stock. From its very nature, no mark of identification can ever be placed upon, nor is it possible to identify, any atom or specific quantity thereof. And so it is that, until in the progress of the gas through the trunk lines the last connection of a pipe devoted to local service in West Virginia has been passed, it is not and cannot be ascertained whether any particular part of the gas, in the aspect of a physical entity, will be consumed in West Virginia or will pass to and be consumed in another State (Rec., 933).

The main pipe lines of some of the seven companies extend only to the State boundary, while in other instances the pipe lines reach into the adjacent States. The West Virginia gas furnished by the Hope Natural Gas Company, Reserve Gas Company, and Pittsburg & West Virginia Gas Company, no one of which operates outside of West Virginia, is all delivered to the purchasing companies at, or practically at, the State line. Of the total amount sold under contract by the United Fuel Gas Company to other companies, about one-fifth is delivered just across the State line in Kentucky and Ohio and the remaining four-fifths are delivered in part to the Ohio Fuel Supply Company at the State line (Rec., 1762), but in the much greater part at points within the State to others of the seven companies, viz., the Columbia Gas & Electric Company (Rec., 1793), Hope Natural Gas Company (Rec., 1770, 1772), and Pittsburg & West Virginia Gas Company (Rec., 1780-1782), which receive such deliveries into their general system. The Manufacturers Light & Heat Company (Rec., 1712, 1716) and Columbia Gas & Electric Company, while both producing and marketing in West Virginia, acquire much the greater part of their respective supplies in West Virginia under their purchase contracts from the Hope Natural Gas Company and United Fuel Gas Company, above mentioned, and thereupon transport out of the State; the Manufacturers Light & Heat Company about four-fifths of its entire net supply, and the Columbia Gas & Electric Company substantially all (Rec., 1736; insert, 380, 415). The Carnegie Natural Gas Company has no contracts for out-of-state deliveries, but transports and markets directly to the steel works of its parent company in Pennsylvania.

Service by Local Companies.

Many of the larger local companies were absorbed by the seven companies, as heretofore pointed out, and a number of others have gone out of business. The present list (Rec., 982) of natural-gas public-service corporations in West Virginia, including the seven companies, is sixty-seven.* A considerable number of these are survivors from the early days, and yet are engaged in the production and supply of gas, particularly in northern West Virginia. The important municipalities of Morgantown, Fairmont, Clarksburg, Weston, Salem, Shinnston, Lumberport, Pennsboro, and others are so served and supplied, in whole or in part (Rec., 1026).

In some of the oldest and richest gas counties, where one or more of the seven companies hold ample supplies and facilities, they furnish either substantially no gas or none at all by direct service.†

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*The sixty-seven companies include a number only incidentally serving gas, such as oil companies and certain carbon-making and manufacturing plants, which utilize their production in their own private enterprises and whose consumers are limited to their employees or to lessors entitled to free gas. Of this character are the South Penn Oil Company (Rec., 1447), Ohio Fuel Oil Company (Rec., 1004), Columbian Carbon Company, Imperial Oil & Gas Products Company, and Owens Bottle Machine Company, none of which in fact supplies gas to the public, nor do they profess or hold themselves out to be public-service corporations (Rec., 998, 1004 *et seq.*).

†In Harrison County, in 1919, fiive of the seven companies owned and operated an aggregate of 127,906 acres of territory, 1,674 wells, and 1,157 miles of pipe line and bought the gas of 161 wells from 57 independent producers. These five companies served not more than 900 domestic consumers and no industries in that county, although their pipe-line systems, gas territory and production surrounded, and in some cases extended into, the cities of Clarksburg and Salem.

The local companies operated contemporaneously with the development and expansion of the seven companies, produced from the same pools, and transported and marketed to consumers in the same West Virginia territory in which the seven companies produced and marketed; and in some instances the same community was partially served by both. In the earlier years the volume of the wells was large, the rock pressure great, and the gas easily marketed through its own native force; and, having an abundant supply and no present or prospective market other than the particular communities then served, these smaller companies in most cases acquired and held only a limited territory, close to the place of consumption, and acquired little or no reserve territory (Rec., 212-213, 1001-1003, 1020, 1021, 1568). While the opportunity to obtain reserve acreage was open to them equally with the seven companies, before and at the time when the latter began their activities in this direction, yet it was neither wise nor financially possible to acquire extensive territory. To have developed additional acreage for which they had no market, would have defeated the very object of a reserve; and to hold such acreage in reserve until an additional supply was needed rendered it probable that the gas would be drained away through the operations of the seven

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Shinnston and other municipalities, which have been without an adequate supply of gas since 1916. In Lewis County, in the same year, four of the seven companies owned and operated an aggregate of 176,739 acres of territory, 1,106 wells, and 795 miles of pipe line and bought the gas from 66 wells owned by 16 independent producers. These four companies sell gas to no industries and no local utilities, nor serve any incorporated cities or towns in that county, their service being limited to approximately 1,200 consumers in rural communities, chiefly lessors receiving free gas as rental (Rec., 1026-1028).

companies in surrounding territory. And when later they required additional gas by reason of the decline of the supply from their own wells or the growth of the communities served, the smaller companies found not only that substantially all available territory had been acquired by the seven companies, but also that such occasional and isolated tracts of gas territory as could be secured were worthless; for the cost of pipe lines to reach these scattered parcels was beyond their financial resources and out of proportion to the value of the project, and the enormous quantities of gas theretofore extracted from the pool by the seven companies had reduced the rock pressure of all wells in the field to the point where compressor stations were necessary adjuncts to transmission of the gas through the lines. In like manner the local companies were unable to reach out into the field to secure the production of the independent producers, for the amount of such production not held under contracts of sale to the seven companies was small and scattered and entailed the like disproportionate and prohibitive cost of lines and compressor stations (Rec., 1278, 1279, 1308-1310, 1361-1362).

Previous Supply to Local Companies by the Seven Companies.

Until the gas shortage of 1916-1917, the lack of reserve territory by the local companies and the diminishing volume of the gas occasioned no practical difficulty in West Virginia; for, notwithstanding the export business of the seven companies and the contracts under which that business was carried on, the local companies, whose own stocks of gas be-

came insufficient, were able to, and did, make up the deficiency by purchases from one or more of the seven companies. (Rec., 1034-1036, 1724, 1728; 1736, at insert pp. 402, 414, 280, 297, 314, 345, 349.) The quantities so purchased were readily and easily furnished, since the seven companies were possessed of an ample surplus, and one or more of their trunk lines lay within the immediate vicinity of, or traversed, the areas of service of the smaller companies, and often served consumers in the same community or territory (Rec., 1011, 1012, 1037). It was thus a mere matter of connecting the lines of the two companies and discharging gas from the one to the other. Sales by the seven companies to local companies were thus customarily effected for some years prior to the commencement of the shortages to West Virginia consumers in 1916-1917. The Hope Natural Gas Company was connected with and supplied the deficiency of the several local companies serving Fairmont, Clarksburg, Weston, and Pennsboro (Rec., 1035); the Carnegie Natural Gas Company was connected with and supplied the several local companies serving Fairmont and Morgantown (Rec., 1034); the Pittsburgh & West Virginia Gas Company was connected with and supplied the deficiency of the local companies serving Fairmont and Glenville (Rec., 1034), and the United Fuel Gas Company was connected with and supplied the deficiency of the local company serving Dunbar, South Charleston and St. Albans (Rec., 1036). Many of these sales yet continue during the milder periods of the year, but since the demands in other States have equalled and exceeded the supply the seven companies have asserted priority of their sales contracts and their obligations to the consumers abroad, and have declined and refused to sell to the

local companies during the winter periods, when the requirements of the domestic consumers are greatest, both in amount and necessity (Rec., 276, 277, 1209, 1210, 1230, 1231, 1724, 1728). This refusal has been one of the chief causes of the suffering, inconvenience and losses by West Virginia consumers.

As a result of the foregoing conditions and circumstances, the local companies and the consumers supplied by them became, were and are dependent upon the seven companies for a part of their supply. As the production of the local companies decreases, this dependency will necessarily become greater. And if and when the seven companies resort to the process of suction (to which the compressor stations are readily applicable) to increase the output of their West Virginia wells, the wells and territory of the local companies will be so far depleted as to render their dependence substantially complete (Rec., 1279, 1310-1312). An official of the Reserve Gas Company and Hope Natural Gas Company says (Rec., 345-6) that this suction is now a common practice in Pennsylvania and eventually will have to be resorted to in West Virginia. This, of course, means the suction of gas from the entire territory surrounding the pump station, and that no well therein will be capable of producing except by the employment of the like suction or other artificial means of extracting the gas; and, as a necessary result, all local companies dependent upon natural pressure to market and distribute their supply will be effectually put out of business unless supplied by the seven companies.

Violation of Seven Companies' Duties to West Virginia Consumers.

From the foregoing it appears that the seven companies, through which the plaintiff States derive West Virginia gas and whose alleged rights are so extensively relied on in assertion of the claims of the plaintiffs, have, in manifest disregard of their duties and obligations to West Virginia and its people:

(1) Engrossed the gas supply of the State.

(2) Absorbed the most important local companies, which, if independent, would have continued to serve West Virginia consumers.

(3) Deprived the remaining local companies of their ability to supply adequately their localities.

(4) Failed and refused to furnish in later years, when the deficiency of the local companies became acute, gas to make good the deficiency, except out of any surplus remaining after satisfying consumption in other States.

(5) Failed and refused themselves to supply needed gas to consumers in the territory of their production or their transportation lines.

(6) Subjected to suffering and inconvenience in homes and public institutions and to industrial loss the people of West Virginia.

(7) Transported for consumption out of West Virginia the gas required for reasonably adequate service therein.

(8) Transported their gas for consumption in other States under color of contracts which (except as to the theoretical provision in favor of West Virginia domestic consumers) subordinated the service of West Virginia consumers to the service of the out-of-state gas companies and consumers.

(9) Aided and abetted by the tenor and intent of their contracts and by their practices the unlimited increase of use of West Virginia gas in the other States by providing for the extension of service to additional consumers there.

(10) Arrogated their contracts to superiority over the pre-existing laws of West Virginia, to which they owed their existence and special rights and prvileges.

(11) By the contracts and transportation above mentioned, renounced their obligations and duties to West Virginia and disabled themselves from the performance thereof.

Causes of Increased Exports.

The causes of the augmented export of West Virginia gas are apparent. Partly applied to substitution for the declining production of Ohio, Pennsylvania, and Indiana, the consumption of West Virginia gas has been gradually increased by the expansion of the distributing gas companies, especially in Ohio, Pennsylvania, and Kentucky; the extension of lines of service; the growth in the number of consumers; and the substitution of natural gas for artificial gas in many places. Much of this is already embraced in this statement, and the record contains many instances and numerous statistics illustrating the growth of the out-of-state companies and their consumers, without regard to the

needs of West Virginia or the inevitable day when even the West Virginia gas would diminish. It will, however, be of interest to cite the following:

Since the year 1903 the Peoples Natural Gas Company, by expansion of its area of service, has increased its consumption threefold (Rec., 431), and during the period 1910 to 1919, the number of consumers increased from 43,315 to 79,112 (Rec., 614-616). In the case of the East Ohio Gas Company the increase was from 161,580 consumers using 26,445,512 M cubic feet in 1910 to 329,005 consumers using 43,469,893 M cubic feet in 1919 (Rec., 621-626). From 1899 to 1919, the consumers of the Philadelphia Company increased from about 16,000 to over 140,000 (Rec., 486).

Uses of West Virginia Gas in Other States.

Much is said in the evidence, and doubtless more will be said as to the use of gas in West Virginia for industrial purposes. We shall refer to this in due order. But at this point it is to be noted that of the West Virginia gas exported to the other States, much was and is furnished directly to manufacturers and other industrial consumers. In other cases, West Virginia gas was and is utilized to supply the domestic consumption of purchasing companies, whose own production was and is diverted to industrial service. This diversion is expressly contemplated under the contracts made by the Hope Natural Gas Company with Manufacturers Light & Heat Company and Peoples Natural Gas Company, above mentioned, and is impliedly contemplated and fully effectuated under the provisions of a number of the other contracts requiring the vendor companies to deliver all the

natural gas needed to supply all of the present and future domestic consumers of the vendee companies (Rec., 1524, 1544, 1560, 1712, 1761). Statistics of the United States Geological Reports for the years 1914 to 1918, both inclusive, show that the amounts used for manufacturing purposes in Pennsylvania (being all industrial consumption except that used for field purposes) were between 92.84 per cent and 100.23 per cent of the entire production of that State (Rec., 1104); and that the amounts used for such manufacturing purposes as compared with the total production in the other importing States ranged during said years as follows: In Ohio, from 54.59 per cent to 93.90 per cent; in Indiana, from 28.37 per cent to 118.50 per cent; and in Kentucky from 122.92 per cent to 169.17 per cent (Rec., 1107, 1109, 1111-1112). Concretely illustrating these proportions, it may be noted that in 1916 Pennsylvania consumed industrially 131,571,641 M cubic feet (Rec., 1736; insert, W. Va. Ex. No. 23), which was more than the total production of that State and practically two-thirds of the total consumption therein for all purposes, and considerably more than double the entire amount furnished to West Virginia consumers by all of the public-service corporations thereof.

So also with the amounts used for such manufacturing purposes, as compared with the total consumption in the importing States. Thus in Pennsylvania the amounts used therefor have at all times during the years 1914 to 1918, both inclusive, exceeded the amounts served to domestic consumers, averaging double the domestic consumption. In the remaining importing States, the amounts used for such manufacturing, as compared with the total consumption during said years, have ranged as follows: In Ohio, from

23.29 per cent to 38.71 per cent; in Indiana, from 16.59 per cent to 35.06 per cent, and in Kentucky from 28.23 per cent to 36.04 per cent (Rec., 1107, 1109, 1111).

Future Prospects of Gas Supply.

It is uncontroverted that the gas fields in Ohio, Pennsylvania and Indiana are either exhausted or in progressive process of exhaustion; that the West Virginia production has passed its peak and for several years has been declining rapidly; that no other gas fields are known or in prospect in Ohio, Pennsylvania, West Virginia or neighboring States; and that the costly explorations to the deeper sands have not yet warranted belief that material increase in supply will result by such means. But, remarking in passing that the statute in question does not forbid or restrict export of gas and that all that is demanded is reasonably adequate service by its public-service corporations, if, by future discoveries of other fields or deeper sand development, a sufficient supply results to provide adequate service to West Virginia consumers concurrently with consumers in other States, nothing in the statute forbids. And some of the larger companies, the seven companies as well as those in Ohio and Pennsylvania, are yet exploring for new fields and profess the hope that the deeper sands will eventually be found profitable (Rec., 135).

But, as bearing on the available volume of gas of the seven companies and the consequential effects of the statute in the other states, is to be noted the capacity of the presently commercial gas sands in holdings in the known fields. The seven companies have an aggregate territory in West Vir-

ginia, which, since the year 1910, at all times has exceeded 2,400,000 acres, with only 689,205 acres thereof developed up to 1920 (Rec., 1736, insert p. 391). It cannot be supposed that this immense reserve has been carried at its great cost for more than a decade, unless they considered these lands to contain gas in profitable quantities.

It is relevant, also, that the required quantity of gas for all consumers probably could be provided by the drilling of additional wells. In 1919, the last year for which statistics are available, the seven companies drilled fewer wells than during any other year in the ten years covered by the statistical table (Rec., 1023); and there was a marked decrease in the number drilled in 1918 as compared with those drilled in 1917. The United Fuel Gas Company, holding the second largest acreage and the least developed territory of the seven companies in 1919, drilled only 15½ producing gas wells and abandoned the same number (Rec., 1736; insert p. 313). A managing officer of the Hope Natural Gas Company and Reserve Gas Company frankly recognizes that the required supply could be had if enough wells were drilled, and that it is merely a question of whether the residuum of gas in the West Virginia fields is to be produced and utilized over a shorter or longer period. He says "it is just up to the people what they are going to do with it;" that the companies "can use it up in two or three years," or "can extend it over a period of ten or fifteen years" (Rec., 349).

Let it be assumed, however, that development is to proceed as before, in the known fields and sands, and that the rate of well drilling is to go on as previously, so that the natural decline will not be overcome, the exhaustion of the West Virginia gas will not be presently retarded.

Mr. Corrin, vice-president of the Hope Natural Gas Company, fixes the maximum life of the present gas supply at ten or fifteen years (Rec., 349). Judge Reed, president of The Philadelphia Company, states that at the present rate of consumption he will be very much surprised if it lasts ten years (Rec., 507). The record contains other estimates of similar character, with some variation in estimated periods (Rec., 943).

From the very beginning of the use of West Virginia gas by the people of the plaintiff States, it was inevitable that some day the production of the West Virginia fields would decline and the gas supply therefrom become insufficient to serve all consumers. This day came in the winter of 1916-1917, and it is now admitted by the seven companies and also by the companies purchasing from them that their present supplies of gas, including the production in the other States, have been for several years insufficient in winter periods to furnish fuel for the heating of dwellings or otherwise to supply their consumers in Ohio, Pennsylvania, Kentucky and Indiana, and that their ability to serve such consumers has become less and less with each succeeding year. Hence it is that, taking as true the testimony for the plaintiffs, the predicted lack of sufficient West Virginia gas to heat the dwellings and otherwise serve these consumers in the plaintiff States, so elaborately and gloomily charged in the bills of complaint as the necessary result of enforcing the statute in controversy, has already come to pass, has existed for several years, and this lack will certainly increase in the future. This has resulted, and will result, by the process of nature, and not as an effect of the statute, which has never been put into force.

Remedies for Gas Shortage.

The consumption of gas has its distinguishing characteristics. Its supply has been aptly described in the record as the rendition of a service rather than the delivery of a commodity (Rec., 1434, 1435, 1652). For cooking, hot-water heating and the heating of dwelling-houses, stores, office buildings, churches, schools and other public and private buildings, as well as for the conduct of industries, gas is valuable according to its constant availability and adequacy. No reserve can be stored on the consumer's premises, as with coal, oil or wood. When needed it is needed immediately and the cost of equipping the premises for the occasional use of other fuel is as great as for a complete change. An intermittent service is undesirable, and unless the service of gas can be made constant and dependable, the value of its use is substantially destroyed. This essential feature, admitted throughout the testimony, is well expressed by Judge Reed, president of The Philadelphia Company, in testifying as to the practicability of apportioning an inadequate supply, who says (Rec., 525):

> "A. * * * You can't satisfy a man by giving him 50 per cent of his requirements. His wife can't cook with it, and his house is cold. He either wants all or nothing.
>
> Q. * * * The fact is, that to properly supply a thousand consumers is better than to improperly supply 2,000; is that the fact?
>
> A. That is the fact; yes, sir."

To the same effect is the testimony of the witness Wyer (Rec., 1437, 1668), who says "that usable service to a lim-

ited number is better than poor or no service to a large number", and recognizes this feature to be one of "the inherent characteristics and natural limitations of the natural gas industry."

This being the character of gas consumption and service, if the volume of gas is insufficient for all, it is obvious that a remedy devised and enforced by someone was and is essential, and that if man does not voluntarily provide the remedy nature will compel it. The manifest course, in view of what has been said, is the limitation of consumption either in respect of the purpose of use or by restriction of the area of service. And it appears that ultimately the restriction of area of service must come, even in the absence of the statute. The witnesses for the plaintiffs admit that in any event, in time of shortage, the shortage is first and most severely felt at the points farthest from the sources of supply, and that consumers nearest those sources obtain relatively the better service. It is also admitted that service to remote consumers is more costly and subject to losses by leakage in transportation. The contracts already referred to show that the gas companies themselves have theoretically recognized the paramount claims of the domestic consumers of West Virginia.

But without anticipating the argument, our present purpose is to point out that though the seven companies oppose the legislative remedy in the controverted statute, they and their officers are in the main wedded to the doctrine of *laissez faire*, with the corollary of uncontrolled discretion of themselves. And, where in cross-examination these specialists have been driven to suggest a remedy, they are at sea and disagree among themselves, agreeing only that West

Virginia consumers are getting too great a share of West Virginia gas. Certain of them advocate restriction of the use to cooking and hot water heating for domestic purposes (Corrin, 348); others suggest limiting the quantity allowed to each consumer (Tonkin, 441-3); others are positive the real remedy lies in increasing the price to the point where the consumer will himself cut down the amount used (Daly, 608; Freeman, 476); others say that eventually the number of consumers must be decreased and the area of service contracted toward the source of supply (Quay, 163-9; Denning, 698); while two others confess frankly that they do not know what can be done (Reed, 525; Sullivan, 297). All of these witnesses, officers of gas companies, declare necessary the use of gas for industrial purposes whenever there is a surplus over the needs of the domestic consumers, and state that the industrial consumption is financially necessary to the gas company and aids to keep down domestic rates (Rec., 288, 328, 437, 476, 525-526). One witness for the plaintiffs (Wyer, 942), advocates the complete elimination of gas for industrial use, as a matter of conservation, and eventually the cutting off of consumers in the remote areas of service.

Since the major portion of the gas used by consumers in the plaintiff States comes from West Virginia through its public service corporations, the necessary result of each of these suggestions, except that of contraction of area of service, is the same; that the adjustments of West Virginia consumers must be made, and their uses of gas must be regulated and restricted, according to the requirements of the consumers in Ohio, Pennsylvania, Indiana and Kentucky, and without regard to the character or extent of the public

service undertaken by these corporations in West Virginia, or their duties and obligations to the people thereof under the laws of that State.

Industrial Consumption in West Virginia.

Much is said in evidence as to the use of industrial gas in West Virginia. But in the light of what has already been said, and the concurring views of the officials of the seven companies, already referred to, that the industrial use is advantageous both to the companies and the domestic consumers, and that gas always has been, and is still used in large volumes in the plaintiff States and elsewhere, no special reference to the past use seems requisite.*

**Gas Used by Carbon Companies.*—Carbon-black manufacturing companies in West Virginia consumed in 1919 approximately nine per cent of the production of the State. An engineer for some of the seven companies, testifying for the plaintiffs, argues the alleged wastefulness of this use of gas, and points out that the quantities so used would provide the deficiency in supply of West Virginia consumers. It is shown by West Virginia that gas for carbon making has never been a customary or public use of gas; that no tariff or provision therefor has been made by the Public Service Commission, and that no public service corporation uses or serves gas for such purpose, except the United Fuel Gas Company, which operates a carbon plant for the utilization of isolated, low-pressure gas (Rec., 991-993, 1060, 1061, 1075). A like plant is operated by the South Penn Oil Company, an oil subsidiary of the Standard Oil Company owning the Hope Natural Gas Company, to which the South Penn markets most of its gas.

In addition to the private character of these carbon companies and their gas supply, their product can only be made from natural gas, and is an essential element of important manufactured products (Rec., 1100, 1101, 1130, 1131, 1137). Generally their gas territory and production are located at remote points. They are rapidly going out of business because of the increase in value of the gas for other purposes (Rec., 1349). And since the lines of the seven companies

As to the present it is to be observed that many of the factories in West Virginia have already been altered so as to consume coal and producer gas artificially manufactured from coal (Rec., 1229, 1345), thus reducing the industrial gas requirements of the State.

In respect of the future, the high price of natural gas, constantly rising, prevents profitable competition with producer gas, except in the few processes to which natural gas is more especially adapted (Rec., 1226-1227, 1345), and when once an industry has installed producer gas, even a temporary seasonal supply of natural gas—as in the summer—would not compensate for the disorganization consequent on the change from producer to natural gas (Rec., 1228).

Testimony was given on behalf of the plaintiffs to the effect that the enforcement of the statute would absorb for West Virginia its entire gas production; but this lies in assertion and prophecy, based largely on speculation and hearsay, coupled with the erroneous assumption that the statute compels not reasonably adequate service to the particular consumers and distributing companies in specified territory, but that the whole production of the State is to be

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afford practically the only market therefor, the gas of the carbon companies now marketed does not materially aid West Virginia consumers; nor would the entire diversion thereof from carbon-black add appreciably to the supply of West Virginia consumers (Rec., 1349). Aside from the questionable right of the plaintiff States to dictate the employment of West Virginia gas, compare the practically exclusive use by Carnegie Natural Gas Company of its supply from both West Virginia and Pennsylvania fields for steel making, in which other fuel is readily usable; the amount of West Virginia gas so used by this one company averaging three-fourths of the annual quantity used for carbon-black in West Virginia during the last decade (Rec., 996, also W. Va. Exhibit No. 19, Rec., 1736, insert pp. 414-423).

pooled and all consumers are to receive all the gas they may choose to demand (Rec., 123, 300-302, 446, 840, 841, 970, 971.) These general forecasts, of course, also leave out of view the circumstances already detailed, diminishing the probable industrial consumption in West Virginia and the jurisdiction of the Public Service Commission to limit consumption to reasonable adequacy, as well as to compel reasonably adequate service.

The character of the plaintiffs' evidence on the point may be summarized by reference to the testimony of their witness Anderson, an engineer employed by several of the seven companies, who supplies alternative estimates of increased industrial consumption in West Virginia, in case of the enforcement of the statute, as follows: on one theory, 98,-628,380 M cubic feet; on another, 55,017,359 M cubic feet; on another, 38,468,334 M cubic feet, and on still another, 32,959,471 M cubic feet (Rec., 824, 825, 836-838).

The fallacy of Anderson's figures, as well as the speculative general forecasts of other witnesses seems sufficiently to appear from the fact that in the year of its largest consumption, the whole consumption of gas available for public service, was only 59,409,460 M cubic feet out of a total supply of 259,414,200 M cubic feet in the hands of the public service companies (Rec., 996). Witnesses for West Virginia testify, and the industrial conditions already stated are persuasive, that even this 1916 consumption will, insofar as the industrial element is concerned, be greatly reduced (Rec., 1345-1346).

Contentions of West Virginia.

It is the contention of West Virginia:

1. That these cases present no controversy between States, but are in reality controversies between West Virginia and its public-service gas companies, in attempted vindication of whose alleged rights the plaintiffs have become nominal suitors.

2. That the West Virginia gas companies, and especially the seven companies controlling the West Virginia gas supply and transporting the major part of the gas to or for consumption in other States, while a shortage exists in West Virginia, were and are West Virginia public-service corporations, owing their existence and their ability to transport gas to other States to the special rights and privileges granted by West Virginia upon the condition that a reasonably adequate service would be rendered to West Virginia consumers.

3. That the business of the gas companies and their gas, in the existing condition of shortage, are affected with the public interest of West Virginia.

4. That the duty to render a reasonably adequate service to West Virginia consumers extends alike to domestic users, public buildings and institutions and industrial users.

5. That under the conditions of existence of the gas companies, both implied and expressly reserved, and in the exercise of the police power, it was within the province of West Virginia to enact the statute in contest, and that the statute was and is necessary and reasonable in its provisions.

6. That the requirement of reasonable adequacy of service to industrial consumers, and the clauses requiring in certain circumstances (and under the safeguards of a hearing and determination before the Public Service Commission, with opportunity for judicial review) the furnishing of gas deficits to local companies, were and are justified and proper.

7. That the gas companies cannot by engagement in interstate commerce, or the desire so to do, evade or abandon their duty to render reasonably adequate service in West Virginia, and that if interstate commerce is engaged in by them, it is and must be in subordination of their duty to West Virginia and the regulating power of that State.

8. That interstate commerce is not regulated, nor was it intended so to be; that any effect on such commerce would be only indirect and incidental; and that under the conditions of gas production, transportation and distribution, the gas, commingled in the pipe lines and wholly incapable of identification, does not enter into interstate commerce until finally it ceases to be drawn on for local supply.

9. That the statute does not infringe upon any guaranty of the Federal Constitution.

10. And that the plaintiffs have no just ground for complaint against West Virginia and have established no case against it.

ARGUMENT.

I.

The cases present no controversy between States.

In the motions to dismiss contained in the answers, we have assigned, among other grounds, that these cases present no controversy between States within the meaning of Article 3, Section 2, of the Constitution. And we think that the general trend of the evidence, as well as the personnel of the witnesses, has fortified in fact the objection in law. The jurisdictional objection is emphasized by the fact, not to be blinked, that while sovereign States have sued, these cases are controversies between West Virginia and certain gas companies. Respecting the plaintiff States and their dignity, West Virginia, in objecting to the jurisdiction, shrinks from impugnment of their motives. But without intimating any unworthy design, we have no alternative except to question the jurisdiction—the preliminary question in every case in this Court. And, indeed, in Kansas *vs.* United States, 204 U. S., 331, this Court said:

> "In these circumstances we think it apparent that the name of the State is being used simply for the prosecution in this Court of the claim of the railroad company, and our original jurisdiction cannot be maintained."

The substantial ground upon which the plaintiffs sue is the individual grievances of their citizens sought to be redressed by the plaintiffs in their character of *parens patriæ*. Subsidiary and trifling in comparison are their complaints

of shortage of gas in municipalities and public institutions. Much that could be said against the jurisdiction is contained in the argument on the merits, to which in the interest of brevity—in a brief already longer than we might wish—the Court is respectfully referred.

The statute of West Virginia here complained of is local in character and applies to a commodity produced within that State, while yet within its borders, and in the hands of its public service corporations. The plaintiffs have no ownership of or property interest in the gas in its original character as a natural resource of West Virginia or at any time thereafter during the successive stages of production, transportation, and marketing thereof to the ultimate consumer. Neither does the statute in anywise affect, modify or trench upon any governmental or sovereign power of the plaintiffs; nor does its operation exert any force upon or prejudicially affect any land, stream, or other property within the sovereign or territorial jurisdiction of the plaintiffs. The thing most clamorously complained of is the non-delivery of a West Virginia commodity, exported therefrom in interstate commerce and ultimately delivered to citizens of Ohio and Pennsylvania. And the question thus arises whether there is presented a controversy between States by the process of aggregating alleged rights of citizens of Ohio and Pennsylvania against West Virginia.

The nature of a controversy between two States, or a controversy to which a State is a party, has been thoroughly discussed and previous cases reviewed in *Louisiana vs. Texas*, 176 U. S., 1, and *Missouri vs. Illinois*, 180 U. S., 208. Neither in those cases nor elsewhere have we found an instance in which this Court has entertained original juris-

diction, predicated solely upon the right of the plaintiff State to sue as the representative of its citizens to enforce their private grievances, or to protect their private claims arising out of the enforcement of the law of another State, in the absence of some special or additional right in the State itself. The right to invoke original jurisdiction in the representative capacity was upheld in *Missouri vs. Illinois, supra,* where there was pollution of the Mississippi River, lying partly within the territorial limits of Missouri, and also in *Kansas vs. Colorado,* 185 U. S., 125, where the question was as to the right of Colorado to divert the waters of the Colorado River flowing through both States.

On the other hand, jurisdiction was denied in *Louisiana vs. Texas, supra,* where the plaintiff sought to enjoin enforcement of quarantine laws of the defendant because of their discrimination against and injurious effect on citizens of Louisiana engaged in commerce between the two States. Referring to the nature of the case Mr. Chief Justice Fuller says:

> "It is in this aspect that the bill before us is framed. Its gravamen is not a special and peculiar injury such as would sustain an action by a private person, but the State of Louisiana presents herself in the attitude of *parens patriæ,* trustee, guardian, or representative of all her citizens.
>
> "She does this from the point of view that the State of Texas is intentionally absolutely interdicting interstate commerce as respects the State of Louisiana by means of unnecessary and unreasonable quarantine regulations. Inasmuch as the vindication of the freedom of interstate commerce is not committed to the State of Louisiana, and that State is not engaged in such commerce, the cause of action

must be regarded, not as involving any infringement of the powers of the State of Louisiana, or any special injury to her property, but as asserting that the State is entitled to seek relief in this way because the matters complained of affect her citizens at large. Nevertheless, if the case stated is not one presenting a controversy between these States, the exercise of original jurisdiction by this Court as against the State of Texas cannot be maintained."

Mr. Justice Harlan, in a concurring opinion, further says:

"But I am of opinion that the State of Louisiana, in its sovereign or corporate capacity, cannot bring any action in this Court on account of the matters set forth in its bill. The case involves no property interest of that State. Nor is Louisiana charged with any duty, nor has it any power, to regulate interstate commerce. Congress alone has authority in that respect. When the Constitution gave this Court jurisdiction of controversies between States, it did not thereby authorize a State to bring another State to the bar of this Court for the purpose of testing the constitutionality of local statutes or regulations that do not affect the property or the powers of the complaining State in its sovereign or corporate capacity, but which at most affect only the rights of individual citizens or corporations engaged in interstate commerce. The word 'controversies' in the clauses extending the judicial powers of the United States to controversies 'between two or more States' and to controversies 'between a State and citizens of another State,' and the word 'party' in the clause declaring that this Court shall have original jurisdiction of all cases 'in which a State shall be a party,' refer to controversies or cases that are justiciable as between the parties thereto, and

> not to controversies or cases that do not involve either the property or powers of the State which complains in its sovereign or corporate capacity that its people are injuriously affected in their rights by the legislation of another State. The citizens of the complaining State may, in proper cases, invoke judicial protection of their property or rights when assailed by the laws and authorities of another State; but their State cannot, even with their consent, make their case its case and compel the offending State and its authorities to appear as defendants in an action brought in this Court. If this be not so, we were wrong in *New Hampshire vs. Louisiana*, 108 U. S., 76, in which case it was held that one State could not, by taking charge of demands or debts held by its citizens against another State, acquire the right to bring a suit in its name in this Court against the debtor State."

From the foregoing it is evident that a suit by one State against another cannot be predicated upon the mere relation of *parens patriæ*, and that the multiplicity or unanimity of complaints by the citizens of the one against the acts of the other cannot be erected into a controversy between States.

In *Oklahoma vs. Atchison, T. & S. F. R. Co.*, 220 U. S., 277, effort was made by Oklahoma to invoke the original jurisdiction in a suit to enjoin foreign railroad companies from breach of the covenants contained in rights of way for their railroad tracks through that State. The question arose as to whether this constituted a controversy to which a State was a party within the meaning of the constitutional provision conferring original jurisdiction. Upon the authority of *Louisiana vs. Texas, supra*, the Court dismissed the bill for lack of jurisdiction, saying:

> "These doctrines, we think, control this case, and require its dismissal as not being within the original jurisdiction of this Court, as defined by the Constitution. Under a contrary view that jurisdiction could be invoked by a State, bringing an original suit in this Court against foreign corporations and citizens of other States, whenever the State thought such corporations and citizens of other States were acting in violation of its laws to the injury of its people generally or in the aggregate; although an injury in violation of law, to the property or rights of particular persons through the action of foreign corporations or citizens of States, could be reached, without the intervention of the State, by suits instituted by the persons directly or immediately injured."

The like holding was made in the companion case of *Oklahoma vs. Gulf, C. & S. F. R. Co.*, 220 U. S., 290, refusing jurisdiction of a suit by Oklahoma to enjoin citizens of other States from violation of the prohibition laws of Oklahoma, as not presenting a controversy to which a State is a party within the meaning of the Constitution.

At the outset we noted that the argument on the merits contains much that could be said against the jurisdiction. This is particularly true in respect of the effort of the plaintiffs to assert the infringement of rights of the gas companies and citizens of the plaintiff States, as to which we respectfully refer the court to Section VI of this brief.

If the original jurisdiction of this Court is attempted to be sustained because of the supply of West Virginia gas to municipalities or public institutions of Ohio and Pennsylvania, we submit that the jurisdiction is equally negatived by the above-cited cases. It cannot be overlooked that the

alleged rights claimed by the plaintiffs for themselves, as well as for their inhabitants, are alleged rights to West Virginia gas derived and derivable through public-service gas companies of West Virginia. Thus mediately derived, the alleged rights of the plaintiffs, as consumers of West Virginia gas in their municipalities or public institutions, can rise no higher than the West Virginia gas companies. We do not ignore the distinction between a question of jurisdiction, and the question whether the alleged right, prosecuted in the particular forum, really exists. But if the plaintiffs have a right to West Virginia gas, it is a right against the seven public service gas companies operating in West Virginia. And if as against some of these companies, as citizens of West Virginia, a suit might conceivably be brought in this Court to compel such companies to furnish gas to or for the use of the plaintiffs in a sovereign or corporate capacity, it would, at best, involve a controversy between the plaintiff States and such companies, and not a controversy between the plaintiffs and West Virginia. This, of course, is a basis of jurisdiction not invoked in the present cases. Whether, if such a suit were brought, it would be necessary for West Virginia to intervene to uphold its statute, and in the interest of a full hearing upon the validity of the statute under which the gas companies ought properly to justify, we need not discuss. But it is apparent that:

(*a*) On the one hand, whether the West Virginia companies shall furnish gas to the plaintiffs, is at most, a matter of controversy between such companies and the plaintiffs, and not a controversy between the plaintiffs and West Virginia, within the meaning of the constitution; and,

(*b*) The question whether West Virginia may validly regulate its public service corporations in the manner attempted by the statute in litigation, involves a controversy between West Virginia and such corporations, and is not a controversy between States within the meaning of the constitution.

In either view,—and both views extend to the full scope of these cases—there is no original jurisdiction in this Court.

II.

These cases must be considered in the light of the peculiar nature of gas and of the gas industry, and the exceptional rules of law applicable thereto.

Passing the question of jurisdiction, we premise discussion of the merits by reference to the fundamental fallacy which underlies the contentions of the plaintiffs. Basing their claim of right to West Virginia gas produced by West Virginia gas companies, they overlook the peculiar nature of the commodity itself and the exceptional status of the corporations, through and under which the plaintiffs seek to maintain their supply.

It is unnecessary to repeat in detail what already has been set forth at large in the statement of facts, is undisputed in the evidence, and has received judicial recognition. Briefly summarizing, the sources of natural gas are limited; the supply itself is exhaustible; and consumption involves the destruction of the very corpus of gas territory. Used for many years for illumination and fuel for domestic and industrial

purposes in West Virginia, Ohio, Pennsylvania, Indiana and Kentucky, the limits of the known or prospectively available gas fields have been defined. Knowledge or belief of the existence of other fields or sources of supply is disclaimed by the witnesses for the plaintiffs, one and all (Rec., 132, 210, 327, 372, 506, 553, 572, 670-671, and 822). There remain, aside from the complete development of the presently commercial sands by the customary methods of drilling and operation: the tenuous hope, none too confidently expressed, that additional paying gas sands may be discovered by the highly expensive and yet unsucessful drilling of deeper wells (Rec., 135); and the application of suction to the wells in the known sands, which process will but hasten the depletion of the sands and the exhaustion of the gas (Rec., 345, 1311).

In the known fields in all of these States it is uncontroverted that the curve of production is downward. The tendency to decline became manifest many years ago in Indiana, Ohio and Pennsylvania, preceding the development for other than local use in West Virginia (Rec., 60-63, 438, 521-524, 699, 726, 947). It was a known incident of gas industry and consumption in those States, the consequences of which were temporarily overcome or held in check by the extension of older fields or the discovery of new fields in those States, as the earlier production fell away. But it ultimately came about that production in those States declined—in Indiana to the point of practical exhaustion; in Ohio to the condition of depletion in some fields and of vast deficiency in the aggregate; and in Pennsylvania to a great insufficiency to meet the increasing domestic and industrial demands of the grow-

ing population in its gas-using districts (Rec., 60-63, 438, 521-524, 699, 726, 947).

Duplication of this history is in progress in West Virginia. Originally possessed of enormous gas resources, yielding a great surplus over its local needs, consumers or gas companies in the other States were permitted to make good the deficit of their own declining production from the ample stores of West Virginia. Finally, between 1916 and 1917, the production of West Virginia itself took a downward course, ever since pursued (Rec., 1603, 996, 997). And so it resulted that with a receding production, subjected to heavy drafts for transportation to other States, the service of West Virginia consumers, subordinated to the wants of consumers elsewhere, became inadequate.

We do not follow narrative further at this point. That already said has sufficed to mark natural gas and the natural-gas industry as peculiar, because of the inherent and antecedently known limitations upon the sources of supply and the inevitability of decline and exhaustion. In this regard natural gas differs essentially from other commodities, and even from those dealt in by ordinary public-service corporations supplying water, artificial gas or electricity. The waters of a water company are continually replenished from seemingly undiminished natural reservoirs; an artificial-gas company can always manufacture new gas; an electric company can generate new power indefinitely. And in the instance of a public utility supplying services, as distinguished from a commodity, such as a railroad or a telephone line, the rendition of the service operates in no degree to diminish the volume of future service. Such instrumentalities may

wear out, but they can be duplicated from an abundance of materials.

It is a result that natural gas, and rights therein, are in many respects governed by exceptional rules of law. Illustrations are found in *Brown vs. Spilman,* 155 U. S., 665, 669, 670, holding that "decisions in ordinary cases of mining, for * * * minerals which have a fixed *situs* cannot be applied to contracts concerning" gas "without some qualification;" in *Ohio Oil Co. vs. Indiana,* 177 U. S., 190, holding valid a statute prohibiting the escape of gas in the air longer than two days, and *Walls vs. Midland Carbon Co.,* 254 U. S., 300, sustaining the prohibition, in certain circumstances, of the manufacture of carbon-black from gas, it being said that in both instances the power of regulation was "dependent upon the natures of oil and gas;" and *Westmoreland & C. Nat. Gas Co. vs. Dewit,* 130 Pa., 235, 18 Atl., 724; and see *Bacon vs. Walker,* 204 U. S., 311, 316. Consequent on this follows the inadmissibility of the indiscriminate application to natural gas and to public-service corporations engaged in its production, transportation or supply, of legal principles applicable to ordinary commodities and to individuals and corporations dealing in or with such commodities.

III.

The West Virginia public service gas companies, including the seven companies, were and are obligated, irrespective of the statute in contest, to furnish West Virginia consumers a reasonably adequate supply of gas.

As stated heretofore, upon the basis of the statistics of the United States Geological Survey the West Virginia gas

transported to other States increased between 1908 to 1916 from 61,664,618 M cubic feet to 200,004,740 M cubic feet, from which year there was a decline to 174,664,650 M cubic feet in 1918, and a sudden drop in 1919 (early in which year the statute in contest was passed) to 139,939,062 M cubic feet (Rec., 1603); that, based on the same statistics, from 1908 to 1919 the proportion of gas so transported to the total production ranged from 55 per cent to 68 per cent (Rec., 1603); that from 1911 to 1916, the net supply of West Virginia gas in the hands of the public-service corporations increased from 173,132,353 M cubic feet to 259,-414,200 M cubic feet, with a decline to 227,649,823 M cubic feet in 1918 and 183,687,047 M cubic feet in 1919, during which period of years West Virginia consumers received from 19.9 per cent to 25.6 per cent of this gas, and the exports were from 74.4 per cent to 80.1 per cent (Rec., 996); that from 1911 to 1919, the seven companies, Hope Natural Gas Company, Reserve Gas Company, Pittsburg & West Virginia Gas Company, Carnegie Natural Gas Company, Manufacturers Light & Heat Company, United Fuel Gas Company and Columbia Gas & Electric Company, have controlled from 80.3 per cent to 91 per cent of this public-service gas anc sold to West Virginia consumers only from 11 per cent t 17.9 per cent (Rec., 996, 997), the residue being trans ported for consumption in other States, and that sinc the winter of 1916-1917 there has been a shortage o gas supply in the very West Virginia districts in or throug which these seven companies have been producing, transport ing or selling gas; that smaller surviving local gas companie were and are without sufficient gas production or reserve by reason of the control of the seven companies; that th

gas shortage in West Virginia has caused suffering and inconvenience in homes, business buildings and public institutions (Rec., 1194-1195, 1343-1345), interruption of industry and expense of alteration of factories and their processes and public institutions, so as to consume other fuel (Rec., 1139 *et seq.*, 1223-1224, 1343-1345); and that these conditions have been confined to no single locality, but have been general throughout large and populous sections of West Virginia.

Is it within the power of the State to protect its inhabitants, and to remedy this evil? We can best answer the inquiry by a brief survey of the rights which these companies have acquired at its hands and of the concomitant duties which they assumed as conditions of the granted rights.

Special Rights and Privileges of Gas Companies.

All of the seven companies, except the Manufacturers Light & Heat Company and the Carnegie Natural Gas Company, are West Virginia corporations. The excepted two are Pennsylvania corporations, admitted to carry on business in West Virginia, under the statute extending to foreign corporations so admitted "the same rights, powers and privileges that are conferred on domestic corporations created for the same purpose," and subjecting them "to the same regulations, restrictions and liabilities that are imposed upon like corporations" created by West Virginia.

Hydro Electric Co. vs. Liston, 70 W. Va., 83, 91; 73 S. E., 86.

Carnegie Nat. Gas Co. vs. Swiger, 72 W. Va., 557, 572; 79 S. E., 3.

Precedent to the statute in controversy, these corporations were at common law and by statute denominated as public service corporations, and were subject to the Public Service Commission Act.

Charleston Nat. Gas Co. vs. Lowe, 52 W. Va., 662; 44 S. E., 410.

Hardman vs. Cabot, 60 W. Va., 664; 55 S. E., 756.

Carnegie Nat. Gas Co. vs. Swiger, 72 W. Va., 557; 79 S. E., 3.

W. Va. Acts of 1913, Ch. 9, Sec. 3.

W. Va. Acts of 1915, Ch. 8.

United Fuel Gas Co. vs. Public Service Com., 73 W. Va., 571; 80 S. E., 931.

Clarksburg Light & H. Co. vs. Public Service Com., 84 W. Va., 638; 100 S. E., 551.

Kelly Axe Mfg. Co. vs. Public Service Com. (W. Va.), 105 S. E., 152.

Manufacturers Light & Heat Co. vs. Ott, 215 Fed., 940.

They were constituted, in their capacity of pipe-line companies, common carriers, "subject to all the duties and liabilities of such carriers under the laws" of West Virginia.

Code of W. Va. (1913), Ch. 52, Sec. 24.

By the nature of the business in which they were actually engaged and by their express professions they held themselves out as public-service corporations, supplying, and ready and willing to supply, gas to the public in West Virginia, and desirous of extending their business in the State (Rec., 1804, 1823, 1843, 1857, 1876, 1896).

They received and hold franchises from municipalities, authorizing the public distribution of gas therein (Rec., 1016), and franchises or permits in the nature thereof, obtained from municipalities and counties, enabling them to lay and maintain pipe lines and other appliances in the public streets and highways (Rec., 1016, 1917).

They have long enjoyed and exercised the right of eminent domain, and in respect of pipe lines an exceptionally expeditious procedure for that exercise. The power of eminent domain, even when not actually called into use, is potentially ever present in aid of the acquisition of rights of way and other property by private contract.

Code of W. Va. (1913), Ch. 42, Secs. 1 and 20; Ch. 52, Sec. 24.

That these companies would have received the above special rights and privileges except upon the terms of affording adequate service to the public of West Virginia, or in contemplation of the subordination of that service to that of the people of other States, is unthinkable.

And yet it is true that the pipe lines and their appurtenances, the compressor stations, as well as the companies transporting the greater part of the West Virginia gas to or for use in other States, owe their existence to the foregoing special rights and privileges. For as the pipe lines and compressor stations enabled these companies to acquire their own holdings of gas territory, which thereby were withdrawn from acquisition by others, so the pipe lines and stations constitute them, except under special circumstances, the only purchasers from, or market of, the independent producer of gas. And by the pipe lines and stations, which

are the only means of transporting the gas to distant points of consumption, these companies are enabled to convey their gas, near or far, to the destination of their choice, within the range of their lines.

Regardless of the law already cited, which in the same breath by which it confers on them the power of eminent domain makes them common carriers (*Code, W. Va.*, Ch. 52, Sec. 24), these companies, as was the case in *United States vs. Ohio Oil Co.*, 234 U. S., 548, refuse to transport for other producers gas which might serve the public in West Virginia. The independent producer must, in general, either stand by and see his gas withdrawn through adjoining operations, or must sell it to one of these companies.

The monopoly thus held by these large companies is described by a short passage from *United States vs. Ohio Oil Co.*, 234 U. S., 548, 559, the language there used in relation to oil being equally applicable to gas:

> "Availing itself of its monopoly of the means of transportation the Standard Oil Company refused, through its subordinates, to carry any oil unless the same was sold to it or to them, and through them to it, on terms more or less dictated by itself. In this way it made itself master of the fields without the necessity of owning them, and carried across half the continent a great subject of international commerce coming from many owners, but, by the duress of which the Standard Oil Company was master, carrying it all as its own."

And the resulting evil is akin to that referred to by the Hepburn Act of June 29, 1906 (34 U. S. Stat. at L., 584), rendering it illegal for interstate carriers to transport com-

modities owned by them or in which they were interested. (See *United States vs. Delaware & H. R. Co.*, 213 U. S., 366; *Delaware, L. & W. Co. vs. United States*, 231 U. S., 363.)

Duties of Gas Companies to Serve West Virginia Public.

The duties assumed and undertaken by these corporations are well stated in *Carnegie Natural Gas Co. vs. Swiger*, 72 W. Va., 557, 571; 79 S. E., 3, as follows:

> "We observe that the Legislature, by general law, has conferred upon pipe-line companies, organized for transporting oil and natural gas, the right of eminent domain, and has thereby necessarily imposed upon them, as public-service corporations, the right and duty of performing a public service. That right and duty is fixed as firmly as if written into the statute. * * * Pipe-line companies organized for transporting gas must serve the public with gas, under reasonable and proper regulations, along the entire line traversed, and for reasonable rates fixed by themselves, or by statute, or by contracts or ordinances of municipalities. * * * The rights of the people are thus protected in nearly every case where the public is served by public service corporations, furnishing water, gas, electricity, or transportation." (Citing *Charleston Gas Co. vs. Lowe*, 52 W. Va., 662; *Hydro-Electric Co. vs. Liston*, 70 W. Va., 83; *Calor Oil & Gas Co. vs. Franzell* (Ky.), 109 S. W., 328; *Olmstead vs. Morris Aqueduct*, 47 N. J. L., 311; *Gibbs vs. Consolidated Gas Co.*, 130 U. S., 396; *Munn vs. Illinois*, 94 U. S., 133).

In *Gibbs vs. Consolidated Gas Co.*, 130 U. S., 396, quoted in *Charleston Nat. Gas Co. vs. Lowe*, 52 W. Va., 662; 44

S. E., 410; *People vs. Chicago Gas Trust Co.*, 130 Ill., 393; 22 N. E., 803, and in many other cases, it was said:

> "These gas companies entered the streets of Baltimore, under their charters, in the exercise of the equivalent of the power of eminent domain, and are to be held as assuming an obligation to fulfill the public purposes to subserve which they are incorporated."

And see:

Producers Transp. Co. vs. Railroad Com. of California, 251 U. S., 228, 231, 232.

Franke vs. Johnstown Fuel Supply Co., 70 Pa. Super. Ct., 446, 457.

It thus appears that the right of eminent domain is delimited by, and coincides with, the public use which it is intended to aid. And that public use is shortly expressed in *Hydro-Electric Co. vs. Liston*, 70 W. Va., 83, 91; 73 S. E., 86, where, holding that a foreign corporation, authorized to do business in West Virginia, may enjoy the right of eminent domain, it is said:

> "This gives the right of eminent domain, to be exercised, however, *for the public use of the citizens of West Virginia.*"

In *Lewis, Em. Dom.* (3 ed.), Sec. 310, it is said:

> "The public use for which property may be taken is a public use within the State from which the power is derived. It seems to be an admitted fact generally, that the power inheres in a State *for domestic uses only, to be exercised for the benefit of its*

own people, and cannot be extended merely to promote the public uses of a foreign State."

See also *Grover, &c., Land Co. vs. Lovella, &c., Irr. Co.,* 21 Wyo., 204; 131 Pac., 43, elaborately discussing this point, and 1 *Nichols, Em. Dom.,* Sec. 29.

The duty of serving the public of West Virginia being plain, it follows that the gas companies were and are obligated to furnish that public within the territory of their operations or along their pipe lines a reasonably adequate supply of gas, and this apart from the Act of 1919, now in contest.

In *Charleston Nat. Gas Co. vs. Lowe,* 52 W. Va., 662, 671; 44 S. E., 410, it was asked and answered:

> "But have the citizens of Charleston an absolute and indefeasible right to the use of the gas upon reasonable and equal terms? Is the company bound to furnish gas to all who apply for it without an express legislative imposition of that duty upon it? Undoubtedly. The courts have so held in many of the States, and their decisions are grounded upon both reason and the best of authority."

In *Carnegie Nat. Gas Co. vs. Swiger,* 72 W. Va., 557, 571; 79 S. E., 3, it was said:

> "Pipe-line companies organized for transporting gas must serve the people with gas, under reasonable and proper regulations, along the entire line traversed, and for reasonable rates fixed by themselves, or by statute, or by contracts or ordinances of municipalities."

And see:

Kelly Axe Mfg. Co. vs. Public Service Com. (W. Va.), 105 S. E., 152.

So in *New York vs. McCall*, 245 U. S., 345, 351, Mr. Justice Clarke said:

> "Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve, and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render."

And see:

Ohio General Code, Secs. 614-12.

Pennsylvania Pub. Laws of 1913, p. 1374; *Public Service Com. Law*, Art. 2, Sec. 1.

Industrial Gas a Public Service.

It is relevant in this relation, though perhaps unnecessary in view of the previous and present professions and practice of the gas companies (*Producers Transp. Co. vs. Railroad Com. of California*, 251 U. S., 228, 232; *United States vs. Ohio Oil Co.*, 234 U. S., 548, 561), both in West Virginia and the plaintiff States, to mention that the scope of the public duty includes not merely the supply of domestic consumers, but also the furnishing of gas for public buildings and for industrial consumption. This relevancy arises because of the contention of one of the witnesses for the plaintiffs (Rec., 942) that the industrial consumption of gas is wasteful, and the prophecy of other witnesses for the plaintiffs that the enforcement of the statute in question will divert to West Virginia the entire gas production of the State. In the statement of facts it has already been indi-

cated that both by representations of readiness and willingness to supply gas for industrial use, and by their actual engagement in the business of furnishing such gas, these companies have stamped such service as a public service. It appears, also, that the industrial consumption has occurred and is still in progress in large volumes and proportions in the other States, and particularly in Pennsylvania (Rec., 344, 349-350, 1104, 1106-1107). And it has been testified with substantial unanimity by the managing officers of the gas companies operating in West Virginia, and by some of those operating in the other States, that the industrial consumption is a financial necessity to the gas companies and an advantage to domestic consumers, because of its influence in preventing the higher domestic rates which would be required if the gas were confined to domestic use (Rec., 288, 328, 437, 476, 525–526). Though in justice to these witnesses, it should be added that in upholding the necessity of industrial consumption they admit the propriety of subordinating the industrial consumption to the domestic.

Laying aside the matter of the professions and practice of the gas companies operating in West Virginia, and apart from the statute now in controversy, it has been held by the highest court of that State that the furnishing of gas for industrial purposes is a public service, and that the business of a gas company in this regard is affected with a public interest.

Clarksburg Light & H. Co. v. Public Service Com., 84 W. Va., 638; 100 S. E., 551.

Kelly Axe Mfg. Co. v. Public Service Com. (W. Va.), 105 S. E., 152.

Recognition of the public character of the service, though not the subject of direct decision, is to be found in *Pennsylvania Gas Co. v. Public Service Com.*, 252 U. S. 23, 31. And the same view is contained in principle in the negative answer in *Interstate Commerce Com. v. Baltimore & O. R. Co.*, 225 U. S. 326, 342, to the inquiry, "May a carrier look beyond the service it is called upon to render to the attitude and interest of the shippers before, or their attitude and interest after, transportation?"

See also:

Hydro-Electric Co. v. Liston, 70 W. Va., 83, 88; 73 S. E., 86.

Mill Creek Coal & C. Co. v. Public Service Com., 84 W. Va., 662; 100 S. E., 557.

Bailey v. Fayette Gas Fuel Co., 193 Pa., 175; 44 Atl., 251.

Lack of Power of Gas Companies to Disable Themselves from Performing Public Duty.

The duty of serving the public of West Virginia appearing, upon no pretext could or can these companies renounce or abandon the duty of furnishing gas to that public to the extent of their ability to do so, within the measure of reasonable adequacy and the territorial limits prescribed by law. In *Gibbs v. Consolidated Gas Co.*, 130 U. S., 396, Mr. Chief Justice Fuller said:

> "It is also too well settled to admit of doubt that a corporation cannot disable itself by contract from performing the public duties which it has undertaken, and by agreement compel itself to make pub-

lic accommodation or convenience subservient to its private interests.

"'Where,' says Mr. Justice Miller, delivering the opinion of the court in *Thomas vs. Railroad Co.*, 101 U. S., 71, 83, 'a corporation, like a railroad company, has granted to it a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes without the consent of the State to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State and is void as against public policy.'

"These gas companies entered the streets of Baltimore, under their charters, in the exercise of the equivalent of the power of eminent domain, and are to be held as having assumed an obligation to fulfill the public purposes to subserve which they are incorporated.'

In *Attorney-General vs. Haverhill Gas L. Co.*, 215 Mass., 394; 101 N. E., 1061, it was said of the gas company:

"The respondent is a corporation, organized to exercise a public franchise of importance to the community in which it conducts its business. It is its duty to exercise this franchise for the benefit of the public, with a reasonable regard for the rights of individuals who desire to be served, and without discrimination between them. It cannot relieve itself from this duty so long as it retains its charter. It enjoys public rights in the streets, which are derived from the Commonwealth, through action of the board of aldermen under authority of the Legislature. It

is a quasi-public corporation, and as such it owes duties to the public. * * * Without legislative authority it cannot sell its property and franchise to another party, in such a way as to take away its power to perform its public duties."

See also:

Oregon R. & N. Co. vs. Oregonian R. Co., 130 U. S., 1, 23.

Central Transp. Co. vs. Pullman P. C. Co., 139 U. S., 24, 42-44.

South Covington & C. S. R. Co. vs. Kentucky, 252 U. S., 399, 403, 404.

Visalia Gas & El. Co. vs. Sims, 104 Cal., 326; 37 Pac., 1044.

Charleston Nat. Gas Co. vs. Lowe, 52 W. Va., 622, 671; 44 S. E., 410.

Town of Gassaway vs. Gassaway Gas Co., 75 W. Va., 60; 83 S. E., 189.

The principle of the foregoing authorities is applicable to the present case. Instead of disposing of their plants, as has been often attempted, the seven gas companies have attempted to disable themselves from the performance of their duty of serving the people of West Virginia by disposing elsewhere of the very subject matter of the service. The disability equally exists, and would be no greater if they sold their pipe-lines.

The Gas Business and West Virginia Gas are Affected with a Public Interest.

The lack of power to disable themselves from the performance of their public duties, applicable to public-service corporations in general, is especially pertinent in the case of natural-gas companies. That the business of such a company is affected with the public interest, within the meaning of the cases reaching from *Munn vs. Illinois*, 94 U. S., 113, to *Union Dry Goods Co. vs. Georgia Pub. Service Corp.*, 248 U. S., 372, 374, 375, is commonplace.

Charleston Gas Co. vs. Lowe, 52 W. Va., 662, 671; 44 S. E., 410.

Clarksburg Light & H. Co. vs. Public Service Com., 84 W. Va., 638; 100 S. E., 551.

Franke vs. Johnstown Fuel Supply Co., 70 Pa., Super. Ct., 446, 456.

Pennsylvania Gas Co. vs. Public Service Com., 252 U. S., 23.

Manufacturers Light & H. Co. vs. Ott, 215 Fed., 940.

But we may justifiably go further. Given a commodity of peculiar attributes, local in its origin, exhaustible, and, in fact, approaching the point of exhaustion, as is West Virginia gas, so that on the one hand it has become a public necessity at home and is, or may be, insufficient both to supply that necessity and to furnish it to consumers abroad, in the hands of corporations owing public duties, in the performance of which the public has an interest, *the gas itself is in a just sense to be regarded as affected by a public interest.*

In *German Alliance Ins. Co. vs. Lewis*, 233 U. S., 38
it was held that even the making of personal contracts, suc
as contracts of fire insurance, might be affected by the publ
interest. Mr. Justice McKenna there said in reply to th
suggestion that only tangible property could be so affecte

> "The distinction is artificial. It is, indeed, but th
> assertion that the cited examples embrace all cases
> public interest. The complainant explicitly so co
> tends, urging that the test it applies excludes the id
> that there can be a public interest which gives th
> power of regulation as distinct from a public us
> which, necessarily, it is contended, can only apply
> property, not to personal contracts. The distinctio
> we think, has no basis in principle (*Noble State Ban
> vs. Haskell*, 219 U. S., 104), nor has the other co
> tention that the service which cannot be demande
> cannot be regulated."

In *Wilson vs. New*, 243 U. S., 332, it was held that th
personal services of the employees of interstate railroads we
so far affected with a public interest as to justify the regul
tion of hours of labor and in consequence a wage standard.

That the public interest may extend to property itself,
distinguished from a business, considered merely as an inst
tution, is illustrated by the instance of the grain elevators
Munn vs. Illinois, 94 U. S., 113. The same idea is co
veyed in *Union Dry Goods Co. vs. Georgia Pub. Servi
Com.*, 248 U. S., 372, 374, where it was said "that capit
invested in an electric light and power plant to supply ele
tricity to the inhabitants of a city is devoted to a use in whic
the public has an interest." In *Block vs. Hirsh*, U. S. Ad
Ops., 1920-'21, page 531, involving the District of Columb

rent law, cases were cited as sustaining the point "that the public interest may extend to the use of land."

In *Franke vs. Johnstown Fuel Supply Co.*, 70 Pa. Super. Ct., 446, 456, this view is expressed as follows:

> "What the company did was from the beginning subject to the conditions under which it existed at all. The public had no interest in, or right to, the gas of the promoters of the Peoples Natural Gas Company until the latter, for the purpose of obtaining the advantages accorded to them under the statute, organized their company. The owners were not compelled to give to the public an interest in their supply of gas, but they became under obligation to the laws of the commonwealth if they used it in the manner prescribed by that law. When the shareholders accepted the charter of the company and proceeded to exercise the franchises thereby granted they invested the public or such limited portion of the public with a use or right of use in the commodity which they supplied. This constitutes a public use—such a use as might have been in the contemplation of the parties when the company was organized."
>
> See also *Bacon vs. Walker*, 204 U. S., 311, 315.

And in *Walls vs. Midland Carbon Co.*, 254 U. S., 300, regulating the consumption of gas in carbon-black manufacture, it was referred to as "a determining consideration" that the State had "an interest to adjust and preserve, natural gas being one of the resources of the State."

We need not go so far as to say that the whole quantity of gas existing in a State at any time is affected by the public interest; for if there is an abundance wherewith to serve all present requirements, it may well be that the public

cannot be said to have an interest in any particular part of i But if the whole quantity of gas is so far reduced, or in pro pect of reduction, that all who at the time desire to consum it cannot be served, and the very gas which is being pro duced by corporations, themselves affected by the public in terest, is immediately necessary for consumption by the peo ple of the State, that very gas may in a correct sense b deemed to be affected with the public interest of the State, an to fall within a different rule. For as said in *Block vs Hirsh, supra*: "Plainly, circumstances may so change in tim or so differ in space as to clothe with such an interest wha at other times or in other places would be a matter of purely private concern;" and then referring to previous decision it was remarked: "They dispel the notion that what in its immediate aspect may be only a private transaction may not be raised by its class or character to a public affair."

Walls vs. Midland Carbon Co., supra, is, indeed, an example of these observations in *Block vs. Hirsh*; for the Walls case related to a failing gas supply, in respect of which it was said:

> "The determining consideration is the power of the State over, and its regulation of, a property in which others besides the companies may have rights, and in which the State has an interest to adjust and preserve, natural gas being one of the resources of the State."

And again it was said of previous cases that,—

> "the State of Wyoming has the same power to prevent the use of natural gas in the production of carbon black, the tendency of which is (it may be the inevitable effect of which is) the exhaustion of the supply of natural gas, and the consequent detriment of other uses."

These considerations would, we believe, sufficiently distinguish *West vs. Kansas Nat. Gas Co.*, 221 U. S., 229, even if the legislation now in contest directly acted on interstate commerce. There the whole volume of gas produced in Oklahoma was more than sufficient to serve the then gas-consuming public of that State, and only the surplus, required by no present necessity in the State, was being transported out of it. Still further, the companies and individuals attacking the validity of the statute there involved were, as more fully appears in the report of the case below (*Kansas Nat. Gas Co. vs. Haskell*, 172 Fed., 545), not engaged, and apparently not obligated to engage, in the public supply of gas in Oklahoma. Therefore, neither they by their business, nor their surplus product, by any existing need, could be said to be affected by any immediate public use. We shall refer to this decision again, in relation to the commerce clause of the Federal Constitution.

IV.

It was within the right and power of the State to regulate the gas companies. The right and power are based on several grounds and their exercise was necessary.

The nature of the gas companies and the relation of their service to the West Virginia public having been adverted to, the legislative right of the State to regulate them, in order to compel the performance of their duties, is manifest and well established. That right, and its due expression, rest upon a triple foundation:

(1) *The Implied Condition Accompanying the Grant of Rights and Privileges to the Companies.*

The implied condition of public service accompanied the grant of the corporate powers and special rights and privileges, and subject to such condition those powers, rights and privileges were accepted by these companies.

Charleston Gas Co. vs. Lowe, 52 W. Va., 662, 671; 44 S. E., 410.

Carnegie Nat. Gas Co. vs. Swiger, 72 W. Va., 557, 571; 79 S. E., 3.

Farmers Loan & T. Co. vs. Galesburg, 133 U. S., 156.

Lake Shore & M. S. R. Co. vs. Ohio, 173 U. S., 285.

New Orleans Waterworks Co. vs. Louisiana, 185 U. S., 336, 346.

Missouri P. R. Co. vs. Kansas, 216 U. S., 262.

In *Charleston Gas Co. vs. Lowe, supra*, it was said, with passing reference to *Gibbs vs. Consolidated Gas Co.*, 130 U. S., 396:

> "But have the citizens of Charleston an absolute and indefeasible right to the use of the gas upon reasonable and equal terms? Is the company bound to furnish gas to all who apply for it without an express legislative imposition of that duty upon it? Undoubtedly. The courts have so held in many of the States, and their decisions are grounded upon both reason and the best of authority.
>
> * * * * * *
>
> "Occupying the streets of Charleston by permission of its council, first had, for the purpose of supplying to the inhabitants natural gas, the company is bound

to furnish gas to every citizen applying therefor and willing to pay the prices agreed upon between the company and the city. The occupancy of the streets by such a company can only be for purposes in which the public is concerned, and the obligations thus assumed by the company, whether expressly incorporated in the franchise or not, will be enforced.

* * * * * *

"The same has been held in cases concerning water companies, which as shown are so nearly akin to gas companies. In *Olmstead vs. Aq. Co.*, 47 N. J. L., 311, we find: 'Although the aqueduct charter contains no express provision requiring the company to supply all consumers, * * * in accepting such charter the company impliedly engages to use it in a manner that will accomplish the legislative design. It is thereby bound to supply on reasonable terms all who apply for water.'

"In *Lombard vs. Stearns*, 4 Cush. (Mass.), 60, the court held: 'By accepting the act of incorporation they undertook to do all the public duties required of it.' "

In *Carnegie Nat. Gas Co. vs. Swiger, supra*, the statement is made of the implied right of the public to service and the duty to serve the public:

"That right and duty is fixed as firmly as if written into the statute."

In *Farmers L. & T. Co. vs. Galesburg, supra*, the inadequacy of the water supplied under a municipal franchise was held to warrant the revocation of the franchise.

In *Lake Shore & M. S. R. Co. vs. Ohio, supra*, it was said:

"The plaintiff in error accepted its charter subject necessarily to the condition that it would conform

to such reasonable regulations as the State might from time to time establish, that were not in violation of the supreme law of the land."

In *Missouri P. R. Co. vs. Kansas, supra*, in upholding the validity of an order of a State Railroad Commission requiring an interstate railroad to operate an additional train within the State, it was said, quoting in part from *Atlantic Coast Line R. Co. vs. North Carolina Corp. Com.*, 206 U. S., 1:

> "But where a duty which a corporation is obliged to render is a necessary consequence of the acceptance and continued enjoyment of its corporate rights, those rights not having been surrendered by the corporation, other considerations are, in the nature of things, paramount, since it cannot be said that an order compelling the performance of such a duty at a pecuniary loss is unreasonable. To conclude to the contrary would be but to declare that a corporate charter was purely unilateral; that is, was binding in favor of the corporation as to all rights conferred upon it, and was devoid of obligation as to duties imposed, even although such duties were the absolute correlative of the rights conferred."

(2) *The Police Power.*

The general police power, apart from any implication of conditions annexed to the grant, embraces the settled right of the State exists to compel its creatures to perform the public duties for which they were created.

Munn vs. Illinois, 94 U. S., 113.

New Orleans Gas L. Co. vs. Louisiana Light, &c. Co., 115 U. S., 650.

Stone vs. Farmers L. & T. Co., 116 U. S., 307.

Reagan vs. Farmers L. & T. Co., 154 U. S., 362.

Prentis vs. Atlantic Coast Line Co., 211 U. S., 210.
Erie Railroad Co. vs. Board of Public Utility Com., 254 U. S., 394.
United Fuel Gas Co. vs. Public Service Commission, 73 W. Va., 571.
Mill Creek Coal & C. Co. vs. Public Service Com., 84 W. Va., 662; 100 S. E., 557.

It is unnecessary to multiply cases; for almost all in which the State's regulatory power has been upheld might be cited in added example.

Of the nature of the police power and its application to the cases at bar, we say nothing more at this point, because we shall have occasion to refer to it later.

(3) *The Reserved Power to Alter or Repeal Corporation Charters and Laws.*

The Legislature at the outset had the power to impose such conditions as it saw fit upon the grant of corporate charters, franchises, rights of condemnation and other privileges to gas companies.

Ashley vs. Ryan, 153 U. S., 436, 441-444.
Home Ins. Co. vs. New York, 134 U. S., 594, 600.
New Jersey vs. Anderson, 203 U. S., 483, 493.

It follows that in authorizing the incorporation of such companies, or such rights and privileges, the Legislature might, in the public interest, have imposed as conditions every provision of the statute assailed. And a corporation accepting a charter upon such conditions would have been estopped to rebel against them.

Ashley vs. Ryan, 153 U. S., 436, 441, 443.
Interstate Consol. S. R. Co. vs. Massachusetts, 207 U. S., 79, 84.

Now it appears that when the seven gas companies were incorporated or admitted to do business in West Virginia, and ever since, it has been within the reserved power of the Legislature "to alter or repeal the charter or certificate of incorporation * * * granted to any joint-stock company, and to alter or repeal any law applicable to such company."

Code of W. Va., Ch. 53, Sec. 8.

W. Va. Acts of 1867, Ch. 5, Sec. 6.

W. Va. Acts of 1882, Ch. 96, Sec. 8.

St. Mary's, &c., Petroleum Co. vs. West Virginia, 203 U. S., 183.

Manufacturers Light & H. Co. vs. Ott, 215 Fed., 940.

This being true, when the Legislature enacted the statute in question it was equally within its power to prescribe that they should render reasonably adequate service to West Virginia, and to provide for the supply of local companies experiencing a shortage, to the extent which the present statute contemplates.

Stanislaus Co. vs. San Joaquin & K. R. C. & I. Co., 192 U. S., 201, 211.

Erie R. Co. vs. Williams, 233 U. S., 685, 700-701.

Sutton vs. New Jersey, 244 U. S., 258, 260.

Fair Haven & W. R. Co. vs. New Haven, 203 U. S., 379, 388.

San Antonio T. Co. vs. Altgelt, 200 U. S., 304.

New York & N. E. R. Co. vs. Bristol, 151 U. S., 556, 567, 568.

Hamilton Gaslight & C. Co. vs. Hammond, 146 U. S., 258, 269-271.

Spring Valley Water Co. vs. Schottler, 110 U. S., 347, 353.

Greenwood vs. Union Freight Co., 105 U. S., 13.

Hammond Packing Co. vs. Arkansas, 212 U. S., 322, 345, 346.

From the decline of West Virginia gas production, the shortage of gas supply in West Virginia, the social and economic dependency on gas in reasonably adequate volume, the domestic and industrial evils resulting from the lack of such service, the "fact accomplished" that there is now, and for several years has been, insufficient West Virginia gas to permit at once the full measure of service in West Virginia and the other States to which it was and is transported, admittedly there must be, in the nature of things, a limitation upon the service and consumption of gas, in respect of either the purposes of the consumption or the territorial area of supply. In this situation, it was and is incumbent on some one to formulate and enforce suitable regulations. And the Congress not having acted, even in respect of the interstate transportation of gas (*Act of June 18, 1910*, Ch. 309, Sec. 7; 36 Stat. at L., 539, 544; *Pennsylvania Gas Co. vs. Public Service Com.*, 252 U. S., 23, 30), the exercise of a regulatory power must emanate either from the State or from the gas companies. And the question is, which should it be?

Inability of Gas Companies to Formulate Regulations and Necessity of State Action.

Even in the absence of the exertion of the State's power, it is to be observed that the managing officers of a majority

of the seven gas companies, and others experienced in the gas business or thrust forward as experts, and appearing as witnesses for the plaintiffs, are entirely at sea and disagree among themselves as to the appropriate remedy, agreeing only that West Virginia gas is declining and that West Virginia consumers are getting too great a share of it. Certain of them advocate restriction of the use to cooking and hot-water heating for domestic purposes (Corrin, 348); others suggest limiting the quantity allowed to each consumer (Tonkin, 441-3); others are positive that the real remedy lies in increasing the price to the point where the consumer will himself cut down the amount used (Daly, 608; Freeman, 476); others say that eventually the number of consumers must be decreased and the area of service contracted toward the source of supply (Quay, 163-9; Denning, 698); while two others confess frankly that they do not know what can be done (Reed, 525; Sullivan, 297). All of these officers of gas companies declare necessary the use of gas for industrial purposes whenever there is a surplus over the needs of the domestic consumers, and state that the industrial consumption is financially necessary to the gas company and aids to keep down domestic rates (Rec., 288, 228, 437, 476, 525-526). One engineer employee of the plaintiffs (Wyer, 942) advocates the complete elimination of gas for industrial use, as a matter of conservation, and eventually the cutting off of consumers in the remote areas of service.

The reasonable anticipation, if regulation were to be left to the gas companies, is accurately gauged by the denial of the plaintiffs of West Virginia's regulatory power, if and when its regulations affect the quantity of gas transported

to the other States, regardless of consequences in and to West Virginia; by the predictions of injury to the other States and gas companies operating therein, by the withdrawal of any West Virginia gas from export (Rec., 526, 605, 606, 854, 972, 973), and by the thought expressed by some witnesses for the plaintiffs, exemplified by Anderson, another engineer of these companies, that, irrespective of the statute, any increased consumption in West Virginia, even because of increased population, would prejudice the other States (Rec., 854):

> "Q. Would any increase of consumption in West Virginia have the result of depriving Pennsylvania and Ohio consumers?
>
> "A. It would have the result of depriving them to that extent, I think.
>
> "Q. That is, for every 1,000 feet of added consumption in West Virginia, consumers in Pennsylvania and Ohio will be deprived to that extent?
>
> "A. I think so.
>
> "Q. And to the extent that the gas companies are prevented from furnishing that 1,000 feet in Pennsylvania or Ohio, those companies will suffer a loss in their plants, or the operation of their plants?
>
> "A. And profits.
>
> "Q. I want to ask you whether the inconvenience in Pennsylvania and Ohio, resulting from the consumption of this extra 1,000 cubic feet of gas in West Virginia, would occur, whether that extra consumption were brought about by the enforcement of this statute, or brought about by additional consumers, or some other cause?
>
> "A. It would occur in the same way and to the same extent.

"Q. In other words, if some citizen of New York or New Jersey should move to Clarksburg, West Virginia, and add to the population that way, and consume gas for domestic purposes, some Pennsylvania or Ohio consumer, or the consumers in those States in the aggregate, would be deprived and inconvenienced to that extent?

"A. Providing he was located on the lines of some of these interstate companies.

"Q. That is what I mean.

"A. Where he could obtain some of their supply, or possible supply."

And see, in similar strain, the testimony of Wyer (Rec., 972, 973):

"Q. It is, however, your idea, regardless of the class of consumption that, to the extent of the increase of every thousand feet of consumption in West Virginia, there would be a corresponding diminution of supply in the other States?

"A. If the act in question were enforced, there would be no supply in the other States coming from West Virginia.

"Q. Suppose we forget about the act and answer the question in the light of the fact that you have declared it unconstitutional?

* * * * * * *

"Q. Putting the thing in this way: Suppose that for some unknown reason a resident and citizen of Massachusetts moves to Clarksburg, West Virginia, with his family, and by reason of the added population, theoretically assumed to be five, you have one more gas consumer and a matter of consumption of

5,000 cubic feet of gas a month. Would the effect of that added 5,000 cubic feet of consumption be to diminish the supply in Pennsylvania and Ohio and that regardless of this statute?

"A. It would not affect the supply in Pennsylvania or Ohio, but it would reduce the amount of gas that could be transported out of the State by the amount that would be used in West Virginia. * * *

"Q. Put it at 1,000 instead of 5,000. There would be in principle and in effect a corresponding diminution and increase?

"A. Yes, an increased demand which must, of course, be met from the local gas supply. I think you misunderstood my former answer. The thing I wanted to drive home was that the consumption per domestic consumer would not be very greatly increased unless there were a very radical reduction in prices from the condition you have now.

"Q. You would expect to cut down the domestic consumption by raising the price?

"A. A raise in price will cut it down. The increased price is the only thing that will adequately conserve natural gas."

In this diversity of opinion of specialists in the gas business, mainly effective to "darken counsel," we think that by the process of elimination, if nothing more,—aside from the aspect of legislative power and duty,—it necessarily fell to the State of West Virginia to enact fitting regulations. And the only question is, whether it had the power, and whether that power has been exercised within the limits of legislative discretion.

V.

West Virginia had the power to enact the statut
and the exercise of the power was reasonable a
within the legislative discretion.

Scope of the Statute.

We pass the question of power to state the substance
the principal clauses of the statute. In pronouncing up
its constitutionality, the Court will not declare it invalid "
surmise or on the barren letter of the statute" (*Bacon*
Walker, 204 U. S., 311, 317; and see *Walls vs. Midla*
Carbon Co., 250 U. S., 300).

Section 1, the dominant provision of the statute, has t
following scope:

(*a*) It applies only to public-service corporations, vi
those persons, firms and corporations who are engaged
furnishing or are required by law to furnish, gas to W
Virginia consumers for domestic, industrial or other c
tomary purposes.

(*b*) The amount to be supplied is a reasonably adequa
supply.

(*c*) The purposes or uses for which the supply is to
furnished are domestic, industrial and the other customa
uses for which gas is consumed or desired by the public.

(*d*) The consumers to be supplied are those residi
within the particular territory in which each such publi

service corporation is engaged in producing, transporting or marketing natural gas.

(*e*) The obligation of such public-service corporation is to so furnish said consumers to the extent of its supply of gas produced in the State.

Section 2 covers the situation where two or more such public-service corporations are engaged in producing, transporting or marketing in the same territory and one of them has an insufficient volume of gas for the reasonably adequate supply of its West Virginia consumers, while the other has a supply in excess of the requirements of its West Virginia consumers. In such case the latter company is required, at its election, either to serve these inadequately supplied consumers as its own, as provided by Section 1, or, out of its excess, to sell to the former company a sufficient amount to cover its deficiency, at such reasonable rates and upon such reasonable terms and conditions as may be fixed by the Public Service Commission.

Section 3 removes the mooted question as to the jurisdiction of the Commission, by expressly extending its powers and authority to the matters embraced in the statute. Section 4 provides for complaint and hearing before the Commission as to alleged violations; and for protection of consumers by appropriate procedure, pending such hearings. Section 5 provides for penalties for violation of orders of the Commission. Section 6 gives to any person injured by violation of the statute the remedy of damages, and provides for the attendance of witnesses and other procedural matters. Section 7 defines the word "person," as used in the statute,

to cover persons, firms, and corporations. Section 8 declares the separability of the statute, both as to the several sections, provisions and clauses thereof, and as to the various persons, firms, corporations and consumers affected thereby.

Thus condensed, and excluding the procedural and punitive provisions, the statute simply means that all public-service corporations of the State must, to the extent of their supply of West Virginia gas, render a reasonably adequate service thereof to those inhabitants of the State who reside in the vicinities or territories where such corporations respectively produce or market, or through which they transport, West Virginia gas.

We have already indicated sufficiently, with citation of authority, that the duties prescribed by this section were, in the main, pre-existing duties at common law and under earlier statutes, the neglect of performance of which by the gas companies instrumental in exporting inordinate quantities of West Virginia gas, rendered necessary the fresh declaration of the rights of West Virginia consumers.

While Section 2 provides for sales by these companies having an excess supply to those having a deficiency, yet this provision has application only where the inadequately served, or unserved, consumers of the local companies reside in the same territory in which the company possessed of a surplus supply produces and markets, or through which it transports, which consumers the last-mentioned company is obligated to serve directly at common law and under the provisions of Section 1; and the requirement of sale to such local companies is not brought into play, unless and until the company having such excess supply first declines or refuses to comply with its obligation to serve directly these inadequately

supplied consumers. The election given to the company having the excess supply is for its benefit and to spare it what might, under certain circumstances, be a burden in providing its own extension for service.

The Statute is a Legitimate Exercise of the Police Power.

Were these provisions a legitimate exercise of the power of the State? The question must be answered in the light of the known characteristics of gas production and its originally inevitable and present decline in West Virginia and elsewhere; the nature of the gas companies as public-service corporations; the relation of the public interest to their business and gas; the absorption by the seven companies of other West Virginia companies; the gas shortage and its effects in West Virginia; the inability of local companies to supply the deficiency, because of the control by the seven companies of gas and gas territory, obtained through the possession of large capital, pipe lines owing their existence to special rights and privileges, and the compressor stations; the conditions attaching to the enjoyment of such special rights and privileges; the reserved statutory power to alter or repeal charters and laws affecting corporations, and the existence of the police power. Pretermitting abstractions, we respectfully insist that the power to enact this legislation is supported by the precedents, which in the latest development would have sustained a still more ample exercise of the power.

The Police Power.

In *Ohio Oil Co. vs. Indiana*, 177 U. S., 190, legislation to prevent wasteful escape of gas from wells was upheld, in view

of the peculiar nature of gas and the right of the State to "consider the relation of rights, and accommodate their co-existence, and, in the interest of the community, limit one that others may be enjoyed" (*Walls vs. Midland Carbon Co.*, 254 U. S., 300).

In *Lindsley vs. Nat. Carbonic Gas Co.*, 220 U. S., 61, relating to a statute prohibiting the pumping of mineral waters for the extraction of carbonic-acid gas, or the production of the unnatural flow of such gas, for commercial purposes otherwise than in conjunction with the mineral waters, it was said of *Ohio Oil Co. vs. Indiana*, "were the question an open one, we should still solve it in the same way."

More recently, in *Walls vs. Midland Carbon Co.*, 254 U. S., 300, it was held that in order to conserve gas, shown to be declining in certain fields where, or in the vicinity of which it was needed for more economical consumption, the State of Wyoming could constitutionally restrict the use of gas for carbon-black manufacture. And it was said, after citing *Ohio Oil Co. vs. Indiana* and *Lindsley vs. Nat. Carbonic Gas Co.*:

> "By reverting to these cases it will be immediately observed that the power of regulation over natural gas is possessed by a State, and in the first case (*Ohio Oil Co. vs. Indiana*) it was exercised to prohibit the employment of the gas as a means of agency in the production of oil against an asserted right of property in the ownership of the land upon which the oil was produced, and, therefore, of the oil and gas as incidents of such ownership, and could be used in such manner and quantity as the landowner might choose."

And in respect of the State's power to protect and preserve gas as a natural resource, it was remarked:

> "And there is great disproportion between the gas and the product, and necessarily there was presented to the judgment and policy of the State a comparison of utilities which involved as well the preservation of the natural resources of the State and the equal participation in them by the people of the State. And the duration of this utility was for the consideration of the State, and we do not think that the State was required by the Constitution of the United States to stand idly by while these resources were disproportionately used, or used in such way that tended to their depletion, having no power of interference.
>
> "The cited cases determine otherwise; and that, as the State of Indiana could prevent the exhaustive use of gas in the production of oil, and as the State of New York could prevent the owner of land from using artificial means to obtain the carbonated waters under his land, the State of Wyoming has the same power to prevent the use of natural gas in the production of carbon black, the tendency of which is (it may be the inevitable effect of which is) the exhaustion of the supply of natural gas, and the consequent detriment of other uses."

Apart from the cases dealing especially with gas, and the particular considerations affecting public-service corporations, the more general authorities dealing with the police power fortify their principles and their application to the cases now at bar.

Of the police power it has been said it is,—

> "One of the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government."
>
> *District of Columbia vs. Brooke*, 214 U. S., 138, 149.
>
> *Eubank vs. Richmond*, 226 U. S., 137, 142.
>
> *Sligh vs. Kirkwood*, 237 U. S., 50, 59.
>
> *Hall vs. Geiger-Jones Co.*, 242 U. S., 539.

And, as said in *Chicago & A. R. Co. vs. Tranbarger*, 238 U. S., 66, 77:

> "This power can neither be abdicated nor bargained away, and is inalienable even by express grant; and * * * all contract and property rights are held to its fair exercise. *Atlantic Coast Line R. Co., vs. Goldsboro*, 232 U. S., 548, 558, and cases cited."

The public welfare to which the protection of the power extends, embraces not only public health, morals, and safety, but also the public convenience and the general prosperity.

> *Chicago, B. & Q. R. Co. vs. Illinois*, 200 U. S., 561, 592.
>
> *Bacon vs. Walker*, 204 U. S., 311, 317.
>
> *Eubank vs. Richmond*, 226 U. S., 137, 142.
>
> *Sligh vs. Kirkwood*, 237 U. S., 52, 59.
>
> *Chicago & A. R. Co. vs. Tranbarger*, 238 U. S., 66, 77.

In *Sligh vs. Kirkwood*, *supra*, it was said:

> "It is not subject to definite limitations, but is coextensive with the necessities of the case and the safeguards of public interest. *Camfield vs. United States*, 167 U. S., 518, 524. It embraces regulations

designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health. *Chicago, B. & Q. R. Co. vs. Illinois,* 200 U. S., 561, 592. In one of the latest utterances of this Court upon the subject, it was said: 'Whether it is a valid exercise of the police power is the question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity.' * * * And, further: 'It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government.' *Eubank vs. Richmond*, 226 U. S., 137."

The scope of this power, and its flexibility in meeting and dealing with modern conditions, are illustrated in *German Alliance Insurance Co. vs. Lewis*, 233 U. S., 1011, where State regulation of fire-insurance rates was upheld, and, again, *Hall vs. Geiger-Jones*, 242 U. S., 539; *Caldwell vs. Sioux Falls Stockyards Co.*, 242 U. S., 599, and *Merrick vs. Halsey*, 242 U. S., 568, upholding the "Blue Sky laws." In *Merrick vs. Halsey*, Mr. Justice McKenna said:

"Every new regulation of business or conduct meets challenge, and, of course, must sustain itself against challenge and the limitations that the Constitution imposes. But it is to be borne in mind that the policy of a State and its expression in laws must vary with circumstances. And this capacity for growth, and adaptation we said, through Mr.

Justice Matthews, in *Hurtado vs. California*, 110 U. S., 516, 530, is the 'peculiar boast and excellence of the common law.' It may be that constitutional law must have a more fixed quality than customary law, or, as was said by Mr. Justice Brewer in *Muller vs. Oregon*, 208 U. S., 412, 420, that 'it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action.' This, however, does not mean that the form is so rigid as to make government inadequate to the changing conditions of life, preventing its exertion, except by amendments to the organic law."

The application of the police power to promotion of the public morality, as in the regulation or prohibition of the manufacture or sale of intoxicating liquors (*Mugler vs. Kansas*, 123 U. S., 623; *Kidd vs. Pearson*, 128 U. S., 1; *Crowley vs. Christensen*, 137 U. S., 86); the protection of the public health, as in the prevention of the adulteration of food (*Plumley vs. Massachusetts*, 155 U. S., 461; *Capital City Dairy Co. vs. Ohio*, 183 U. S., 238; *Price vs. Illinois*, 238 U. S., 446); or the limitation of the hours of labor (*Muller vs. Oregon*, 208 U. S., 412; *Miller vs. Wilson*, 236 U. S., 373; *Holden vs. Hardy*, 169 U. S., 366), are commonplace.

Measures to safeguard the business prosperity of the State are exampled by the prohibition of monopolies and combinations in restraint of trade (*Waters-Pierce Oil Co. vs. Texas*, 212 U. S., 86; *Grenada Lumber Co. vs. Mississippi*, 217 U. S., 433; *Standard Oil Co. vs. Missouri*, 224 U. S., 270; *International Harvest. Co. vs. Kentucky*, 234 U. S., 199); of unfair competition (*Central Lumber Co. vs. South Dakota*, 226 U. S., 157), and of the sale or shipment of products

detrimental to the business reputation of an important industry (*Sligh vs. Kirkwood*, 237 U. S., 50). In *Sligh vs. Kirkwood, supra*, Mr. Justice Day says:

> "We may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the State of Florida. It was competent for the Legislature to find that it was essential for the success of that industry that its reputation be preserved in other States wherein such fruits find their most extensive market. The shipment of fruits so immature as to be unfit for consumption, and consequently injurious to the health of the purchaser, would not be otherwise than a serious injury to the local trade, and would certainly affect the successful conduct of such business within the State. The protection of the State's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that purpose."

If it be true that in any instance the State may legislate in the interest of the health and general business prosperity of its inhabitants, it must follow that health may be preserved against injury by cold as well as by disease or adulteration of food, and that the industry of the State may be protected as well from destruction by deprivation of necessary fuel as from mere injury by practices hurtful to its trade or reputation. Upon this ground, aside from any peculiar relations or obligations affecting public-service corporations, it is plain that the State may legislate in defense of its people

and its industries in prevention of a real and present danger arising from deprivation of gas.

Industrial Use of Gas.

We do not understand it to be contended seriously that the enforcement of the statute in respect of domestic users would materially add to the volume of West Virginia gas consumption. One of the plaintiffs' witnesses admitted as much (Rec., 972).

We anticipate, however, special reference on the other side to two features of the statute: (1) the provision made for industrial gas supply and (2) the provision made for the sale of gas to other gas companies not themselves possessed of a reasonably adequate supply.

In regard to the objection to the requirement of a reasonably adequate supply for industrial use, several answers at once appear:

(*a*) Assuming, as we have already shown, that the supply of industrial gas is, by the holding out by the gas companies of their readiness and willingness to furnish such gas (subject only to the needs of domestic consumers) and by the settled law of West Virginia, a public service, there is no distinction in principle between that service and the domestic service. The truth is, indeed, that between the supply of gas for domestic purposes and for industrial use there is but one difference. The service differs only in degree of necessity, because the hardship is personally more acute in case of failure of the domestic supply than where the failure pertains to the industrial supply. This, of course, constitutes a sufficient basis for classification, preferential to the

domestic consumer. But the fact that classification may be justified, proves nothing in regard to the nature of the subordinate service. The latter is still a public service, the obligation to render which may be suspended in time of shortage, but which revives whenever there is a surplus of gas which enables its performance.

The plaintiffs disagree with the policy of West Virginia in denominating the industrial service as public and in requiring its fulfillment, though they inconsistently permit industrial use within their own confines—even of West Virginia gas—and the gas companies in general emphasize the necessity of such use. We pursue this no further, because, however the plaintiffs may disagree, the uses to which gas may be applied in West Virginia was and is a local question for the determination of the Legislature of that State; and the objections of the plaintiffs go, as said in *Ohio Oil Co. vs. Indiana,* 177 U. S., 190, 211, "not to the power to make the regulations, but to their wisdom," and "with the lawful discretion of the legislature of the State" there can be no judicial interference.

And see:

Lindsley vs. Nat. Carbonic Gas Co., 220 U. S., 61, 76, 77.

Walls vs. Midland Carbon Co., 254 U. S., 300.

As to the dismal forebodings, the assertion that the enforcement of the statute as to industrial consumers will absorb all of the West Virginia gas, it may be sufficient to remark that these are wholly speculative, and "mere prophecies which are ventured" (*Tanner vs. Little,* 240 U. S., 369, 385).

But in this day the mantle of prophecy ordinarily yields to probabilities based on known facts.

The industrial changes as to fuel which have taken place in West Virginia, as a result of the gas shortage, and the constantly increasing rates, competing unfavorably with producer gas (Rec., 1229-1230), afford substantial evidence to this Court, as they may well have done to the Legislature, that no such result would happen.

Still further, in this relation, the presumption being in favor of the validity of the statute and the burden being on the plaintiffs to show a violation of constitutional guaranties, there can be no declaration of unconstitutionality upon mere loose opinion or conjecture. The repeated refusal to declare public-service rates confiscatory in advance of actual test, is illustrative.

Knoxville vs. Knoxville Water Co., 212 U. S., 1, 18, 19.

Willcox vs. Consolidated Gas Co., 212 U. S., 19, 54.

Northern Pacific R. Co. vs. North Dakota, 216 U. S., 579; 236 U. S., 585.

Des Moines Gas Co. vs. Des Moines, 238 U. S., 153, 173.

Missouri vs. Chicago, B. & Q. R. Co., 241 U. S., 533, 539, 540.

(*b*) The plaintiffs, overlooking the language of section 1, defining the territorial limits within which reasonably adequate service is required of each several company, imply the postulate, contrary to the fact, that the entire volume of gas is to be thrown into a vast hotchpot, to be drawn upon at will. Whereas by plain interpretation, the duty of each pipe-line

company severally is limited to the territory in which its gas supply is produced, or through which it is transported, or in which it is served by such company.

(*c*) Further, it is ignored by the plaintiffs that by the provisions of Section 4 and the correlation of the Public Service Commission Act, appropriate administrative hearing and determination, with judicial review, effectually guard against the requirement by the consumer, domestic or industrial, of more than a reasonably adequate supply. If a decision of the Commission as to reasonable adequacy, in respect of either volume or economy of consumption, is deemed erroneous, the gas companies will have their day in court. Such questions can be answered "when they arise" (*Noble State Bank vs. Haskell*, 219 U. S., 104, 112). This Court is not called upon to sit in "anticipatory judgment" (*Tanner vs. Little*, 240 U. S., 369, 385).

Supply of Gas to Local Companies.

What has been said as to industrial consumption, applies still more fully to Section 2 of the statute relative to the supply in amounts to be fixed by the Commission of deficits to gas companies having a shortage, when the supplying company has gas in excess of the amount necessary for the reasonably adequate supply of its own consumers in the State, and providing for physical connection of lines after due hearing, and the fixing of reasonable terms, conditions and rates; to which is added the proviso that the company having the surplus may itself, in the alternative, furnish the consumers within the territory a reasonably adequate supply.

In point of fact, it is shown by the proofs that the suppl
of gas to local companies having a deficit, is precisely wha
has been done by most of the seven companies in the pas
(Rec., 1034-1036), what in the present they do amon
themselves (Rec., 1712, 1769, 1780, 1791), and what the
do, and desire to do, in respect of companies out of th
State (Rec., 1509, 1524, 1544, 1554, 1560, 1729, 173
1745, 1752, 1761). It is shown also that the shortage o
the West Virginia local companies is due in large measur
to the control, amounting to a virtual monopoly, of th
West Virginia gas supply and fields, acquired in their cha
acter as West Virginia public-service corporations obligate
to serve the public of that State.

We submit that there is no savor of constitutional in
fringement, nor unreasonableness, in requiring the seve
companies to perform acts of the precise character habituall
performed by them in the past, nor in enacting that the
shall, in the alternative, supply, either directly or indirectl
through local companies, consumers whom the seven con
panies were legally compellable to supply in advance of th
passage of the statute.

The requirement by the State, in the exercise of the polic
power, of co-operation in the public interest, among pe
sons or corporations engaged in business, is no new thin
in the law. *Noble State Bank vs. Haskell*, 219 U. S., 10
110, 112, sustaining a statute establishing a deposito
guaranty fund by the involuntary contributions of bank
is an example. There it was said "that an ulterior publi
advantage may justify a comparatively insignificant takin
of private property for what, in its immediate purpose, is
private use." The Workmen's Compensation Acts are a

added illustration (*New York Central R. Co. vs. White*, 243 U. S., 188; *Mountain Tie & T. Co. vs. Washington*, 243 U. S., 219).

The alternative compulsion of physical connections with local companies having a deficit is no different from the common requirement of physical connections or interchange of facilities in the case of railroads and other public utilities.

W. Va. Acts of 1913, Ch. 9, Sec. 8.

W. Va. Acts of 1915, Ch. 8, Sec. 24.

Ohio General Code, Secs. 522, 614-63.

Pennsylvania Pub. Laws of 1913, p. 1374, *Pub. Service Com. Law*, Art. I, Sec. 1.

And such connections already exist in most instances (Rec., 1034-1036; 1736 at pp. 402-414).

The validity of such requirements has often been sustained.

Wisconsin, M. & P. R. Co. vs. Jacobson, 179 U. S., 287.

Grand Trunk R. Co. vs. Michigan R. Com., 231 U. S., 457, 468.

Chicago, M. & St. P. R. Co. vs. Iowa, 233 U. S., 334.

Pacific Teleph. & Teleg. Co. vs. Wright-Dickinson H. Co., 214 Fed., 666.

Pioneer Teleph. & Teleg. Co. vs. State, 38 Okla., 554; 134 Pac., 398.

Hooper Teleph. Co. vs. Nebraska Teleph. Co., 96 Neb., 245; 147 N. W., 674.

VI.

The plaintiffs claim through the West Virginia gas companies, have no higher right, and have no title to relief.

Various clauses of the Federal Constitution are invoked by the plaintiffs, as invalidating the statute. Much was said in the bills and evidence, and doubtless more will be said, as to the property, rights, and contracts of the gas companies, and losses from the predicted uselessness of pipe lines leading to, and distributing plants located within, the other States, and the inability of the gas companies to perform their contracts and to supply West Virginia gas to or in the other States.

The constitutional objections pressed by the plaintiffs are these:

(1) Impairment of the obligation of contracts.

(2) Deprivation of property without due process of law.

(3) Denial of the equal protection of the laws.

(4) Abridgment of the privileges or immunities of citizens of the plaintiff States or of the United States.

(5) Violation of the interstate commerce clause.

Before passing to particular consideration, one general observation is applicable. The alleged rights claimed by the plaintiffs for themselves and their inhabitants are alleged rights to West Virginia gas, derived and derivable through

gas companies, public-service corporations of West Virginia, obligated from the beginning to serve the public of that State, subject in their other transactions to that primary duty of public service, and from the outset amenable to the laws of the State. And thus mediately deriving their alleged rights, the rights of the plaintiffs can rise no higher than those of the gas companies, and the wrongs complained of are in reality alleged wrongs to the companies, which, if non-existent, leave the plaintiffs with cases of *damnum absque injuria.*

Leaving out of view the pertinent circumstances that in the majority of instances the West Virginia companies transporting through pipe lines gas to or for consumption in other States, have by their express contracts agreed to furnish gas for the other States only to the extent of their supply (Rec., 1509, 1524, 1544, 1712, 1738, 1745, 1769, 1780), that in most of the contracts West Virginia domestic consumption is abstractly given a preference (Rec., 1509, 1524, 1544, 1712, 1738, 1745, 1769, 1780), and that in some instances, notably the Hope Natural Gas Company and United Fuel Gas Company, the contracts provide for priority of supply as among the purchasing companies (Rec., 1560, 1565, 1738, 1752), so that by the contracts themselves in time of shortage, whether periodic or in the ultimately permanent condition, some companies in the plaintiff States may be supplied, while others are cut off, *we submit for consideration in the analysis of the alleged rights of the plaintiffs the following question: Whether the plaintiff States have a direct right or direct remedy against the West Virginia public service companies to enforce the transportation or delivery of West Virginia gas to, or for use in, the plaintiff States?* Unless the

question can be answered affirmatively, the plaintiffs' title to relief against West Virginia is at an end.

Title of Plaintiffs to Allege Unconstitutionality.

As to the gas companies, and especially the seven companies operating in West Virginia, as well as the citizens of the plaintiff States, a short answer may be made. If the statute unconstitutionally injures them in property or contract rights, that would not entitle the plaintiffs to complain, "since it is a well-settled rule of this Court that it only hears objections to the constitutionality of laws from those who are affected by its alleged unconstitutionality in the features complained of." "The plaintiffs must show that their own rights are infringed."

Jeffrey Mfg. Co. vs. Blagg, 235 U. S., 571, 576.

New York Central R. Co. vs. White, 243 U. S., 188, 199.

Plymouth Coal Co. vs. Pennsylvania, 232 U. S., 531, 545.

Arkadelphia Mill. Co. vs. St. Louis S. W. R. Co., 249 U. S., 134, 149.

VII.

LEAVING FOR SEPARATE CONSIDERATION THE COMMERCE CLAUSE, THE STATUTE DOES NOT VIOLATE OTHER CONSTITUTIONAL GUARANTIES.

Impairment of Obligation of Contracts, Due Process of Law, and Equal Protection of the Laws.

The constitutionality of the State's exercise of power in the manner of the statute is not sucessfully impugned by the circumstances that the gas companies have expended money in the construction of pipe lines and pump stations, and that for the supply of gas in foreign States they have made contracts with other companies or consumers there, or that consumers in other States have made contracts or mechanical arrangements for the consumption of gas. The plaintiffs and their citizens, and the gas companies in West Virginia and in the plaintiff States, knew, one and all, from the outset, the peculiar exhaustible nature of gas, the status of the West Virginia companies, and their subordination to West Virginia laws, present or prospective, enacted in the exercise of the police power. If it be true that the State may validly compel the rendition of adequate service to its people by public-service corporations operating within its borders, the State's authority cannot be defeated by expenditures in aid of evasion of that service, or contracts or arrangements having that result.

The contention that the seven companies engaged in business, and that their pipe lines and pump stations were constructed and are used as facilities for the service of con-

sumers in foreign States, is fallacious. These instrumentalities were built and are employed for the transportation of an available volume of gas at present consumed in part within West Virginia and in a greater part outside of the State. So long as these lines and stations are employed for the transportation of this quantity of gas, their owners are entitled to a fair return upon the reasonable value of their property so employed for the public convenience (*San Diego L. & T. Co. vs. National City*, 174 U. S., 739; *Cotting vs. Goddard*, 183 U. S., 79; *San Diego L. & T. Co. vs. Jasper*, 189 U. S., 439; *Stanislaus Co. vs. San Joaquin & K. R. C. & I. Co.*, 192 U. S., 201; *Knoxville vs. Knoxville Water Co.*, 212 U. S., 1; *Willcox vs. Consolidated Gas Co.*, 212 U. S., 19; *Railroad Com. vs. Cumberland T. & T. Co.*, 212 U. S., 414; *Lincoln Gas & El. Co. vs. Lincoln*, 223 U. S., 345; *Simpson vs. Shepherd*, 230 U. S., 352). And the right would be as clear if an increased quantity, or even the whole, of the gas were consumed in West Virginia as if apportioned to the advantage of other States, as now. The consumption in West Virginia of an augmented amount of gas would, of course, result in an enlarged aggregate of the rates paid by the consumers therein. And it might be that as a consequence of increased devotion of lines and stations to the service of the West Virginia consumers, or a not improbable influence on operating costs, an upward adjustment of rates in West Virginia would be proper. But this, after all, is but a matter of rates. If fairly compensated, the gas companies are not entitled to refuse to West Virginia an adequate service merely because a greater remuneration can be obtained elsewhere.

If in the case of some of these companies contraction of

the volume of gas conveyed to other States should result in the impairment and ultimate destruction of the usefulness of transportation or distributing facilities serving only those States, the injury to the owners of these facilities would be more apparent than real. The tendency of the gas supply to exhaustion, and the obligation to render adequate service to West Virginia consumers, was as well known on the first day of their career as on the last; and all of the gas companies, both in West Virginia and elsewhere, had the right and opportunity to anticipate in charges against consumers the depreciation or obsolescence resulting from diminished usefulness of these facilities (*Knoxville vs. Knoxville Water Co.*, 212 U. S., 1, 11; *Railroad Com. vs. Cumberland Tel. & Teleg. Co.*, 212 U. S., 414, 424; *Simpson vs. Shepard*, 230 U. S., 352, 458; *Kansas City S. R. Co. vs. United States*, 231 U. S., 423, 446). Whether all of the companies have disinterestedly refrained from exercising this right to compensate themselves we do not stop to inquire; but we perceive no reason for assuming the case to be in their favor on this point. And the affirmative proof, in a number of instances, shows depreciation allowances and reserves (Rec., 263-265, 443-444).

Whatever may be the result in reference to property devoted to the service of consumers in other States or to contracts made with them, or consequentially affecting their service, the constitutional power of West Virginia, nevertheless, remains clear and certain. The expenditures for that property and those contracts were made subject to the police power of the State and find no protection in the constitutional provisions against the impairment of the obligation of a contract or the deprivation of property without due

process of law or any other guaranty of the State or Federal Constitution. In *Chicago, B. & Q. R. Co. vs. McGuire*, 219 U. S., 549, 568, referring to the right to make contracts, Mr. Justice Hughes said:

> "It is subject, also, in the field of State action, to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals, and welfare of those subject to its jurisdiction. This limitation has had abundant illustration in a variety of circumstances."

In *Chicago & A. R. Co. vs. Tranbarger*, 238 U. S., 67, it was said:

> "But a more satisfactory answer to the argument under the contract clause, and one which at the same time refutes the contention of plaintiff in error under the due process clause, is that the statute in question was passed under the police power of the State for the general benefit of the community at large and for the purpose of preventing unnecessary and widespread injury to property.
>
> "It is established by repeated decisions of this Court that neither of these provisions of the Federal Constitution has the effect of overriding the power of the State to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away, and that all contract and property rights are held subject to its fair exercise. *Atlantic Coast Line R. Co. vs. Goldsboro*, 232 U. S., 548, 558, and cases cited. And it is also settled that the police power embraces regulations designed

to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals, or safety. *Lake Shore & M. S. R. Co. vs. Ohio*, 173 U. S., 285, 292; *Chicago, B. & Q. R. Co. vs. Illinois*, 200 U. S., 561, 592; *Bacon vs. Walker*, 204 U. S., 311, 317."

In *Hudson County Water Co. vs. McCarter*, 209 U. S., 348, a statute of New Jersey prohibiting the diversion of the water from fresh-water streams of the State to other States was upheld as against the owner of water mains laid for the purpose of carrying water from New Jersey to New York. Overruling the argument that the statute impaired the obligation of contracts, took property without due process of law, and denied the equal protection of the laws, it was said by Mr. Justice Holmes:

> "The defense under the 14th Amendment is disposed of by what we have said. That under Article 1, Section 10, needs but a few words more. One whose rights, such as they are, are subject to State restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject-matter. *Knoxville Water Co. vs. Knoxville*, 189 U. S., 434, 438; *Manigault vs. Springs*, 199 U. S., 473, 480."

In *Rast vs. Van Deman*, 240 U. S., 342, 363, Mr. Justice McKenna said:

> "Besides, as the business is subject to regulation, the contracts made in its conduct are subject to such regulation. *Louisville & N. R. R. Co. vs. Mottley*, 219 U. S., 467, and *New York C. & H. R. R. Co. vs. Gray*, 239 U. S., 583."

Against the application of the foregoing principles, public-service corporations are not immune. The opinion of Mr. Justice Clarke in *Union Dry Goods Co. vs. Georgia Pub. Service Corp.*, 248 U. S., 372, fully demonstrates this. The following cases also, by express adjudication and concrete illustration, show that the requirement from a public-service corporation of adequate service to the public violates no constitutional provision, even though the rendition of such service is attended with pecuniary loss:

Wisconsin M. & P. R. Co. vs. Jacobson, 179 U. S., 287.

Atlantic Coast Line R. Co. vs. North Carolina Corp. Com., 206 U. S., 1.

Missouri P. R. Co. vs. Kansas, 216 U. S., 262.

Washington vs. Fairchild, 224 U. S., 510.

So in *Erie R. Co. vs. Board of Public Utility Com.*, 254 U. S., 394, in refuting an argument against the change of elevation of tracks at crossings, ordered by the Board, it was said:

> "That the States might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the soverign of the soil. *Denver & R. G. R. Co. vs. Denver*, 250 U. S., 241, 246. To engage in interstate commerce the railroad must get on to the land; and, to get on to it, must comply with the conditions imposed by the State for the safety of its citizens. Contracts made by the road are made subject to the

possible exercise of the sovereign right. * * * If the burdens imposed are so great that the road cannot be run at a profit, it can stop, whatever the misfortunes the stopping may produce."

Abridgement of Privileges and Immunities.

What has been said above applies equally to the claim of abridgement of privileges and immunities of citizens of other States or of the United States. In *Barbier vs. Connolly*, 113 U. S., 27, 32, the whole matter was summed up by Mr. Justice Field as follows:

> "But neither the amendment as a whole, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity."

And see:

Slaughter House Cases, 16 Wall., 36.
Re Kemmler, 136 U. S., 436, 448, 449.
Giozza vs. Tiernan, 148 U. S., 657, 661, 662.

In *Western Union Tel. Co. vs. Commercial Mill Co.*, 218 U. S., 406, 418, it was dryly remarked that it was "rather late in the day" to contend that the Fourteenth Amendment, either in the privileges and immunities clause or the other clauses, prevented "the regulation of public-service corporations" by a State.

In leaving this point, we stay for a moment to remark that

the plaintiff States are not citizens of any State or of the United States:

Stone vs. South Carolina, 117 U. S., 430, 433;
Postal Tel. Cable Co. vs. Alabama, 155 U. S., 487;
Title Guaranty & S. Co. vs. Idaho, 240 U. S., 136;

and that the gas companies are not citizens within the privileges and immunities clauses of the Federal Constitution:

Blake vs. McClung, 172 U. S., 239, 259;
Western Turf Assoc. vs. Greenberg, 204 U. S., 359, 363;
Selover vs. Walsh, 226 U. S., 112, 126.

VIII.

The statute does not regulate interstate commerce.

It is urged against the statute that it amounts to an unconstitutional regulation of interstate commerce for the reason that if an adequate amount of gas is furnished to West Virginia the volume of gas transported to other States will be diminished. And this objection is argued as if the gas companies held no peculiar relation to West Virginia and were bound by no peculiar obligations to it, and as if the gas affected were a mere ordinary subject of barter and sale, like other commodities. The contention would be the same in principle, and not more startling in form, if the Consolidated Gas Company of New York City, engaged in supplying artificial gas in the metropolitan territory, should assert the right to abandon its obligations to the citizens of New York upon the plea that it was entitled to enter into interstate commerce by selling its gas to New Jersey or Philadelphia. In-

deed, the proposition, when based on the claim of freedom of interstate commerce, would equally support a contention that these companies have the right to export from West Virginia to other States the entire stock of gas at their command. For, as testified by witnesses for the plaintiffs, already quoted, every addition to consumption in West Virginia lessens to that extent the volume of gas available for transport to the other States. And the ultimate conclusion would be that no supply whatever to West Virginia could be compelled.

We think that to the objection, based on the commerce clause, there are several answers:

(1) That the West Virginia public-service corporations have no right to engage in interstate commerce, except in subordination to the performance of their duties to the State;

(2) That if interstate commerce is affected, the effect is only indirect and incidental, and therefore, in the absence of congressional enactment, the effect is not violative of the commerce clause; and

(3) That under the conditions of gas production, transportation and supply, the gas does not enter into interstate commerce until the local consumption has been provided for.

Interstate Commerce by Public-Service Corporations.

At the outset let us say that we do not in the least doubt that the sale and transportation of gas may be, and often are, interstate commerce. The decisions of this Court foreclose that question in the circumstances then in judgment. But anterior to sale and transportation, arises the inquiry whether,

and to what extent, the person engaging, or desiring to engage, in interstate commerce is lawfully entitled to do so.

The question here is, not whether a State may prohibit or restrict the transportation of natural gas from its territory into another State, but *whether the State may require companies—owing to its people the obligation of adequate service—to perform that service*, even though the performance may involve the intrastate consumption of gas which otherwise might be transported to another State.

If the gas companies owe a duty to the people of West Virginia, the performance of that duty cannot be evaded merely because they prefer to enter into interstate commerce rather than to perform it. In *Hudson County Water Co. vs. McCarter*, 209 U. S., 348, in upholding the validity of a New Jersey statute prohibiting the transportation of water from any fresh-water stream in the State to a place out of the State, Mr. Justice Holmes said:

> "A man cannot acquire a right to property by his desire to use it in interstate commerce. Neither can he enlarge his otherwise limited and qualified right to the same end."

The same principle is asserted in somewhat different form by three judges sitting in the District Court for the Northern District of West Virginia, in *Manufacturers Light & H. Co. vs. Ott*, 215 Fed., 940, 951. Although the question before the court was primarily one of rates, its language is equally applicable to the question of adequacy of service, since the regulatory authority of the State in respect to rates and service rest upon the same basis, the police power. Judge Woods, delivering the opinion, said:

"The testimony is undisputed that the main source of natural-gas supply is in West Virginia, and that the cost of supplying gas to consumers in that State is necessarily much less than in the other States. It seems obvious that West Virginia corporations supplying gas to the citizens of that State from wells in the State cannot say the rates fixed to consumers in West Virginia are confiscatory, because at the same rates the companies would lose money on business which they had chosen to conduct in other States in association with corporations of those States. Even if it be conceded that interstate commerce is involved, the principle must be regarded as settled beyond dispute."

And, on page 952, it was further said:

"The fact that the Manufacturers Light and Heat Co. may have improvidently accepted franchises from municipalities in Ohio and Pennsylvania requiring gas to be furnished at the same rates charged in West Virginia, and that reductions at these points would require gas to be furnished there at less than cost, may be worthy of consideration by the Commission in prescribing the rates in West Virginia.

"But it cannot be controlling, for to hold so would be to enable the gas companies to contract away the police power of the State of West Virginia to require reasonable rates to its own citizens."

In *South Covington & C. S. R. Co. vs. Kentucky*, 252 U. S., 399, 403, the principal business of the company was the carriage of passengers in interstate commerce between Cincinnati, Ohio, and Kentucky cities across the Ohio River. A subsidiary corporation through which the South Covington

Company operated in part had its termini in Kentucky, though many of the passengers traveled by continuous passage to Cincinnati. The Kentucky statute requiring separate cars or compartments for white and negro passengers was held constitutional, it being said that the effect of the statute, insofar as it touched interstate commerce, was merely incidental. Mr. Justice McKenna said:

> "There was a distinct operation in Kentucky. An operation authorized and required by the charters of the companies, and it is that operation the act in question regulates, and does no more, and therefore is not a regulation of interstate commerce. This is the effect of the ruling in *South Covington & C. Street R. Co. vs. Covington*, 235 U. S., 537. The regulation of the act affects interstate business incidentally, and does not subject it to unreasonable demands.
>
> "The cited case points out the equal necessity, under our system of government, to preserve the power of the States within their sovereignties as to prevent the power from intrusive exercise within the national sovereignty, and an interurban railroad company deriving its powers from the State, and subject to obligations under the laws of the State, should not be permitted to exercise the powers given by the State, and escape its obligations to the State, under the circumstances presented by this record, by running its coaches beyond the State lines."

In *Erie R. Co. vs. Board of Public Com.*, 254 U. S., 394, it was said in regard to an order of the board requiring the change of elevation of tracks at crossings:

> "If it reasonably can be said that safety requires the change, it is for them to say whether they will in-

> sist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. *Denver & R. G. R. Co. vs. Denver*, 250 U. S., 241, 246. To engage in interstate commerce the railroad must get on to the land; and, to get on to it, must comply with the conditions imposed by the State for the safety of its citizens. Contracts made by the road are made subject to the possible exercise of the sovereign right. * * * If the burdens imposed are so great that the road cannot be run at a profit, it can stop, whatever the misfortunes the stopping may produce."

The authorities cited by the plaintiffs are not pertinent. If it be true, as previously pointed out, that a gas company, or its business, or the commodity in which it deals, is affected by the public interest, precedents are not wanting to show that the principles relating to interstate commerce in ordinary goods and chattels are inapplicable. In *Geer vs. Connecticut*, 161 U. S., 519, and *New York vs. Hesterberg*, 211 U. S., 31, it was held that a State could prohibit the exportation of game killed within its boundaries, and also prohibit the sale therein of game imported from another State. While in these instances the public interest attained the dignity of public ownership, the cases establish that generalizations from authorities referring to ordinary subjects of interstate commerce are inapplicable to a business or commodity affected with a public interest, and that interstate commerce in a commodity so affected may be restricted, or even prohibited, though such commerce in ordinary merchandise could not be.

It is no answer to what has been said that if a State can

compel an adequate supply of gas to its citizens and thereby prevent its exportation to another State, the other State may impose a similar restriction on the interstate shipment of corn, wheat, lumber or other commodities. Those commodities lack entirely the exhaustibility and other peculiarities of gas. Until their production or distribution shall become affected with a public interest in the sense that the gas business is so affected, no such case will occur. In *Tanner vs. Little*, 240 U. S., 369, 385, in sustaining the validity of a statute imposing a heavy license tax on merchants using trading stamps or redeemable coupons, Mr. Justice McKenna said:

> "Nor is there support of the system or obstruction to the statute in declamation against sumptuary laws, nor in the assertion that there is evil lesson in the statute, nor in the prophecies which are ventured of more serious intermeddling with the conduct of business. Neither the declamation, the assertion, nor the prophecies can influence a present judgment. As to what extent legislation should interfere in affairs political philosophers have disputed and always will dispute. It is not in our province to engage on either side, nor to pronounce anticipatory judgments. We must wait for the instance. Our present duty is to pass upon the statute before us, and if it has been enacted upon a belief of evils that is not arbitrary we cannot measure their extent against the estimate of the Legislature."

In *Noble State Bank vs. Haskell*, 219 U. S., 104, where a law requiring banks to maintain a guaranty fund for the protection of depositors was held valid, Mr. Justice Holmes said:

"It is asked whether the State could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise."

And see also *German Alliance Ins. Co. vs. Lewis*, 233 U. S., 389, 415.

The case of *West vs. Kansas Nat. Gas Co.*, 221 U. S., 229, already referred to, is not inconsistent with the above views, and does not militate against the statute. In that case, as already noted, neither the corporations and individuals who were plaintiffs, nor their gas, could be said to be affected with a public use, since the persons themselves were not engaged in the business of public gas supply in Oklahoma, and their gas was required by no present necessity in that State. Accordingly, the Oklahoma statute was not in substance, or even ostensibly, enacted in regulation of a public utility, so as to render merely indirect or incidental any decrease in the volume of gas transported out of the State. On the contrary, the principal and direct design of the Oklahoma statute was to prevent exportation of gas. This was the more manifest from the discrimination in respect to the use of highways and the right of eminent domain, made between persons engaged in transporting gas within the State and those transporting it to other States, as pointed out in *Haskell vs. Kansas Nat. Gas Co.*, 224 U. S., 217, 221, a second appeal of the *West case*. And this dominant design to prohibit interstate transportation is referred to by Mr. Justice McKenna in 221 U. S., 229, 257, where, after citing *Manufacturers' Gas & O. Co. vs. Indiana Gas & O. Co.*, 155 Ind., 545; 58 N. E., 706, he says:

> "The case is valuable because the court, through the same justice who wrote the opinion, distinguished between an exercise of the police power to regulate the taking of natural gas and its prohibition in interstate commerce."

And, at page 262, Mr. Justice McKenna adds:

> "We repeat again there is no question in the case of the regulating power of the State over natural gas within its borders."

The later decisions in *Public Utilities Com. vs. Landon*, 249 U. S., 236, and *Pennsylvania Gas Co. vs. Public Service Com.*, 252 U. S., 23, as well as *Franke vs. Johnstown Fuel Supply Co.*, 70 Pa. Super. Ct., 446, and the other State decisions hereinafter cited, recognized the local character of gas supply and its regulations, even though the gas had theretofore been in interstate commerce. And we submit that in the latter aspect the local element equally inheres when by the public interest with which its owner's business or the gas itself is affected, or by the physical process by which the gas is transported, the gas remains subject to the local use in advance of its last journey across the State line.

Interference, If Any, with Interstate Commerce is Indirect and Incidental.

If by the statute interstate commerce is affected, the effect is indirect and incidental and does not invalidate the law. The direct purpose of the law is to compel the performance of a public duty by those obligated to perform it, and by a legitimate exercise of the police power to protect against

the injury to persons and property consequent on the failure to perform the public duty. Conceivably, interstate commerce might not be affected at all, and this is presently true, if, as the evidence indicates, the gas companies hold in reserve sufficient territory to supply the deficit without subtracting from the quantity of gas transported to other States. But even if the quantity of gas entering into interstate commerce should be diminished as a consequence of the statute, the authorities well establish that the commerce clause would not stand in the way. To argue to the contrary would be to contend that the State would stand powerless to relieve its citizens from the most flagrant discrimination, or even against *a total deprivation of gas*, at the hands of its public-service corporations, which, for gain, preferred to serve consumers in other States.

That the supply of gas for local consumption, even though it may previously have been transported in interstate commerce, or is derived from a common stock, part of which is destined for such transportation, is essentially a matter of local concern and subject to regulation by the States, in the absence of interference by Congress, is now settled.

Pennsylvania Gas Co. vs. Public Service Com., 252 U. S., 23.

Public Utilities Com. vs. Landon, 249 U. S., 236.

Manufacturers Light & Heat Co. vs. Ott, 215 Fed., 940.

Franke vs. Johnstown Fuel Supply Co., 70 Pa. Super. Ct., 446.

State vs. Flannelly, 96 Kan., 372; 152 Pac., 22.

Union Dry Goods Co. vs. Georgia Public Service Com., 248 U. S., 372.

Mill Creek Coal & Coke Co. vs. Public Service Com., 84 W. Va., 662; 100 S. E., 557.

In *Pennsylvania Gas Co. vs. Public Service Com.*, 252 U. S., 23, 30, Mr. Justice Day said:

"The thing which the State Commission has undertaken to regulate, while part of an interstate transmission, is local in its nature, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown, in the State of New York. The pipes which reach the customers served are supplied with gas directly from the main of the company, which brings it into the State; nevertheless, the service rendered is essentially local, and the sale of gas is by the company to local consumers, who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to factories and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city.

"This local service is not of that character which requires general and uniform regulation of rates by congressional action, and which has always been held beyond the power of the States, although Congress has not legislated upon the subject. While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers is required in the public interest, and has not been attempted under the superior authority of Congress.

"It may be conceded that the local rates may affect the interstate business of the company. But this fact does not prevent the State from making local regulations of a reasonable character. Such regulations are always subject to the exercise of authority by Congress, enabling it to exert its superior power under the commerce clause of the Constitution."

The validity of State legislation incidentally or indirectly affecting interstate commerce, even though it diverts to the local need commodities or facilities which otherwise might go into or aid interstate commerce, has been upheld by repeated adjudications. The principle is clearly stated by Mr. Justice Hughes in the *Minnesota Rate Cases* (*Simpson vs. Shepard*, 230 U. S., 352), where, after saying that the States cannot directly tax interstate commerce or prohibit interstate trade in legitimate articles of commerce, he says:

> "But within these limitations there necessarily remains to the States until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by State legislation from the foundation of the government, because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the States should continue to supply the needed rules until Congress should decide to supersede them. Further, it is competent for a State to govern its internal commerce, to provide local improvements, *to create and regulate local facilities,* to adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of its people,

although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which *the State appropriately deals in making reasonable provision for local needs*, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action." (Italics ours.)

And again, on page 410, is set forth the exact principle for which we contend, stated as follows:

"In the intimacy of commercial relations much that is done in the superintendence of local matters may have an indirect bearing upon interstate commerce. *The development of local resources and the extension of local facilities may have a very important effect upon communities less favored*, and to an appreciable degree alter the course of trade. The freedom of local trade may stimulate interstate commerce, while restrictive measures within the police power of the State, enacted exclusively with respect to internal business, as distinguished from interstate traffic, may in their reflex or indirect influence *diminish the latter and reduce the volume of articles transported into or out of the State*. It was an objection of this sort that was urged and overruled in *Kidd vs. Pearson*, 128 U. S., 1, to the law of Iowa prohibiting the manufacture and sale of liquor within the State, save for limited purposes. See also *Geer vs. Connecticut*, 161

U. S., 519, 534; *Austin vs. Tennessee*, 179 U. S., 343; *Capital City Dairy Co. vs. Ohio*, 183 U. S., 238, 245; *Missouri P. R. Co. vs. Kansas*, 216 U. S., 261." (Italics ours.)

The principle that interstate commerce may constitutionally be affected indirectly or incidentally by the State in the exercise of its police power has been asserted in many cases, wherein the inevitable result of the regulation within the State has been to subtract from the quantity of a commodity entering into interstate commerce. Examples are readily afforded by the instance of the prohibition of the manufacture and sale of intoxicating liquors (*Kidd vs. Pearson*, 128 U. S., 1); the prevention of the sale of oleomargarine, colored so as to imitate butter (*Plumley vs. Massachusetts*, 155 U. S., 461; *Capital City Dairy Co. vs. Ohio*, 183 U. S., 238); the shipment of game out of the State or the sale of imported game within the State (*Geer vs. Connecticut*, 161 U. S., 519; *New York vs. Hesterberg*, 211 U. S., 31); the transportation of water out of the State (*Hudson County Water Co. vs. McCarter*, 209, U. S., 348), and the shipment of immature citrus fruit from a State largely engaged in the production thereof (*Sligh vs. Kirkwood*, 237 U. S., 52). And it has been held that a general restriction of pipe-line pressure which in practical result would prevent transportation of gas out of a State was valid (*Jamieson vs. Indiana Natural Gas & O. Co.*, 128 Ind., 555; 28 N. E., 76).

The police power of the State embraces to this extent of indirect or incidental interference, not merely commodities which are the subject of interstate commerce, but also the very instrumentalities of that commerce.

Smith vs. Alabama, 124 U. S., 465.

Nashville C. & St. L. R. Co. vs. Alabama, 128 U. S., 96.

New York, N. H. & H. R. Co. vs. New York, 165 U. S., 628.

Erb vs. Morasch, 177 U. S., 584.

Southern R. Co. vs. King, 217 U. S., 524.

Chicago, R. I. & P. R. Co. vs. Arkansas, 219 U. S., 453.

Atlantic Coast Line R. Co. vs. Georgia, 234 U. S., 280.

St. Louis, I. M. & S. R. Co. vs. Arkansas, 240 U. S., 518.

Though interstate commerce be incidentally or indirectly affected, the police power of the State includes the authority to compel a reasonably adequate service to the communities within it at the hands of a public-service corporation, though it is engaged in interstate commerce; and *up to the point where reasonably adequate local facilities are afforded by a public-service corporation, the State may exercise a free hand. Until that point is passed, interstate commerce is not unconstitutionally infringed.*

Gladson vs. Minnesota, 166 U. S., 427.

Lake Shore & M. S. R. Co. vs. Ohio, 173 U. S., 285.

Wisconsin M. & P. R. Co. vs. Jacobson, 179 U. S., 287.

Atlantic Coast Line R. Co. vs. North Carolina Corp. Com., 206 U. S., 1.

Mobile J. & K. C. R. Co. vs. Mississippi, 210 U. S., 187.

Missouri P. R. Co. vs. Larabee Flour Mills Co., 211 U. S., 612.

Missouri P. R. Co. vs. Kansas, 216 U. S., 472.

Washington vs. Fairchild, 224 U. S., 510.

Grand Trunk R. Co. vs. Michigan R. Com., 231 U. S., 457.

Chicago M. & St. P. R. Co. vs. Iowa, 233 U. S., 334.

Michigan C. R. Co. vs. Michigan Railroad Commission, 236 U. S., 615.

Chicago, B. & Q. R. Co. vs. Railroad Commission 237 U. S., 220.

Illinois Central R. Co. vs. Mulberry Hill Coal Co., 238 U. S., 275.

Seaboard Air Line R. Co. vs. Railroad Com., 240 U. S., 324.

The substance of the foregoing authorities is negatively stated in *Mobile, J. & K. C. R. Co. vs. Mississippi*, 210 U. S., 187, wherein it was said:

> "It is enough to add to that which we have said, that the decree of the Supreme Court does not work an interference with, or cast a direct burden upon, interstate commerce. The cases of the *Illinois C. R. Co vs. Illinois*, 163 U. S., 142; *Cleveland, C., C. & St. L. R. Co. vs. Illinois*, 177 U. S., 514, and *Mississippi R. Commission vs. Illinois C. R. Co.*, 203 U. S, 335, cited by the companies to sustain their contentions, are not apposite. In those cases there was an interference with interstate trains for local purposes, though local needs had been adequately supplied."

The same proposition is affirmatively laid down in *Chicago, B. & Q. R. Co. vs. Railroad Commission*, 237 U. S., 220, 226, as follows:

"In reviewing the decision we may start with certain principles as established: (1) It is competent for a state to require adequate local facilities, even to the stoppage of interstate trains or the rearrangement of their schedules. (2) Such facilities existing—that is, the local conditions being adequately met—the obligation of the railroad is performed, and the stoppage of interstate trains becomes an improper and illegal interference with interstate commerce."

Local Character of Gas Supply and Point of Entry of Gas Into Interstate Commerce.

We have already argued that the seven gas companies and others similarly situated, from their legal status, were and are incapacitated from engaging in interstate commerce, except in subordination to the fulfillment of their duty to consumers in West Virginia and to the extent of the surplus remaining after the fulfillment of that duty. Stated in another way, the gas in the pipe lines remains subject to the public interest and the duty of these companies as long as that duty remains unperformed, or until the public interest and the duty are effectually evaded by the escape of the gas over the State boundary.

Apart from the above legal contentions, we submit respectfully that by reason of the physical attributes of gas transportation and supply, it does not enter into interstate commerce until the State boundary is reached, or at least until the ultimate point where it is needed for reasonably adequate service in West Virginia has been passed.

Generalizing, though admitting that there may be exceptions in the great bulk of the record, it appears that the pipe

lines by which the gas is transported to other States are not confined to interstate transportation. The gas is fed into the pipe lines through innumerable subsidiary or field lines bringing the gas from the wells in West Virginia. The gas is commingled in the pipe lines, whether destined for consumption in West Virginia or whether it is proposed that a quantity thereof, definite or indefinite, shall cross the boundary and go into another State. Branching from the pipe lines are still other lines by which the gas supplied by these companies for use in West Virginia is withdrawn from the common stock and distributed directly or delivered to local companies for distribution.

While in the pipe line supplying at once the intrastate consumers and delivering gas to or for consumption in the other States, no mark or badge of identification is or can be placed upon any particular atom or larger volume of the gas. The situation is sufficiently set forth in the following excerpt from the testimony of the plaintiffs' engineer Wyer (Rec., 933, 934):

> "Q. In the case of a well feeding into a line, which line in turn carries gas partly to points of consumption in West Virginia, and partly to points of consumption in Pennsylvania and Ohio, does that gas have any label on it?
>
> "A. It does not. There is no original package, no identity, nothing to distinguish ownership, all intermingled.
>
> "Q. Well, how do you find out then where this gas is going when it comes out of the well and finds its way into a line?
>
> "A. Well, for any particular well in West Virginia, it might be very difficult—in many cases abso-

lutely impossible—to tell, the way the well is connected to some of these large trunk lines, whether that gas is ultimately going to get to Pennsylvania, or Ohio, or, in other cases, whether it is going to get to Ohio or Indiana.

"Q. In a company like the Hope Natural Gas Company, which is supplying gas partly in West Virginia, and supplying it partly to companies which in turn supply the other States, can you tell when that gas starts on its continuous journey, as you call it, from the well, where that gas is going?

"A. No, sir.

"Q. Can anybody?

"A. No, sir. That is, I mean, you could not state that this particular thousand feet of gas is going to be used in West Virginia, and this particular thousand feet of gas in the Hope property, will be used through the Peoples Company in Pennsylvania, and this one through the East Ohio Company in Ohio. The gas is all intermingled, without any chance for identity.

"Q. And where does the opportunity first occur for identifying the gas which is going into Pennsylvania or Ohio or any other States?

"A. There would be no chance for identifying the gas from particular individual wells. The only gas that you could identify would be the gas passing the measuring station at the State line, and that would be merely a total volume measurement giving you the total volume passing that point, without any relation as to whether it came from any particular well in West Virginia."

It may be fortuitous rather than influential that in some instances the deliveries of gas are made at measuring stations

located at, or as near as is practicable to, the State boundary line. An illustration is afforded by the Hope Natural Gas Company, which, professing not to operate outside of West Virginia (Rec., 184, 186, 187, 1736, insert p. 270) delivers gas to the Peoples Natural Gas Company, controlled as well as itself by the Standard Oil Company, at measuring stations situate at the West Virginia-Pennsylvania boundary (Rec., 303-304). The same is true of delivery by the Pittsburg & West Virginia Company to the Equitable Gas Company (Rec., 1730). The result of all which, it may be noted in passing, is to give room for insistence by the gas companies, on the one hand, that they are not subject to State regulation, because engaged in interstate commerce (as to which see *Franke vs. Johnstown Fuel Supply Co.*, 70 Pa. Super. Ct., 446, involving the Peoples Natural Gas Company and gas so derived from the Hope Natural Gas Company), and, on the other hand, that in the absence of Congressional action there can be no Federal regulation, the net result of which is the argument that these companies are free from any regulation. Not overlooking that interstate commerce is "a practical conception" (*Public Utilities Com. vs. Landon*, 249 U. S., 236, 245), it seems to us a necessary consequence of the character of the gas companies and the circumstances of gas transportation and supply, above detailed, that until the State boundary is reached, or until a reasonably adequate supply has been furnished to West Virginia consumers, or at least until the last branch line for service in West Virginia has been passed, so that the gas which will pass to the other State or States can be identified, the gas does not enter into interstate commerce.

The authorities supporting this principle, though dealing

with facts much more unfavorable to the States than the situation in the present case, have settled the rule that, as long as property intended for interstate commerce remains a part of the common mass of the property of the State, or when property which has been in such commerce becomes part of the common mass, it is not yet or longer in interstate commerce and is subject to the jurisdiction of the State like other property. It suffices to cite the following cases:

In *Brown vs. Houston*, 114 U. S., 622, it was held that coal arriving from Pennsylvania in Louisiana and there awaiting sale, still afloat in the Mississippi River on the barges on which it had been brought from Pennsylvania, and later sold for export, had entered into the common mass of property of the State, and was subject to its taxing power.

In *Coe vs. Errol*, 116 U. S., 517, 528, logs at the place of shipment, but not yet committed to the common carrier for carriage out of the State, were held subject to the taxing power of the State, it being said that they continued to be "part of the general property of the State," until they had "entered upon their final journey for leaving the State and going into another State."

In *Diamond Match Co. vs. Ontonagon*, 188 U. S., 82, 92, also relating to forest products, it was held that the property still remained a part of the general mass within the State, which had jurisdiction to tax it, and that this jurisdiction might be exercised at the village "nearest to the last boom or sorting gap of the stream in or bordering on the State in which said property naturally would be and was intended to be last floated during the transit thereof."

The same principle was involved in:

Pittsburgh & S. Coal Co. vs. Bates, 156 U. S., 577.

American Steel & W. Co. vs. Speed, 192 U. S., 500, 520.

General Oil Co. vs. Crain, 209 U. S., 211.

Bacon vs. Illinois, 227 U. S., 502.

McCluskey vs. Marysville & N. R. Co., 243 U. S., 36.

Arkadelphia Mill. Co. vs. St. Louis S. W. R. Co., 249 U. S., 134.

Public Utilities Co. vs. Landon, 249 U. S., 236.

Pennsylvania Gas Co. vs. Public Service Com., 252 U. S., 23.

The same rule was expressly applied by the plaintiff, Pennsylvania, in review of proceedings of its Public Service Commission in *Franke vs. Johnstown Fuel Supply Co.*, 70 Pa., Super. Ct. 446, having then before it the very system of delivery from the Hope Natural Gas Company to the Peoples Natural Gas Company disclosed in the case at bar. It being in evidence in the Pennsylvania case that after passing the measuring station at the State boundary gas from Pennsylvania wells became mingled with the West Virginia gas in the same pipe line, the court said:

> "When the gas was delivered by the Hope Gas Company at the State line there was no determinable destination or ascertained place of consumption in Pennsylvania. It was stored in the pipes of the Peoples Gas Company and in them distributed to various points where it was burned."

It was then said, at page 461 of the opinion:

"Nothing has been said thus far of that aspect of the case with respect to which it is contended that

the gas obtained from West Virginia was taken out of the operation of the Federal commerce law because it became mingled with the general body of property in the State. It is property of a peculiar character necessarily confined in tanks or pipes and distributed from place to place by pressure through diverging pipes. It was not consigned from one state to a terminus in another. It was delivered into the containers of the appellant in the State of Pennsylvania and controlled by the latter in its distribution from place to place and so mingled with the Pennsylvania gas that its identity as an imported product was entirely lost. It would seem to have as fully lost its distinctive character as an import as did the coal in the case of *Brown vs. Houston*, 114 U. S., 622, where a flat-boat loaded with coal at Pittsburgh and floated down the river to Louisiana was held to have become merged in the property of the State although it remained in the boat in the same condition in which it was shipped from Pittsburgh and was merely moored to the river bank. A like conclusion was reached in *Pittsburgh Coal Co. vs. Bates*, 156 U. S., 577."

We think it logically to follow, both from the cases in this Court and the *Franke case* (and that in view of the *Franke Case*, Pennsylvania, at least, is in no position to claim otherwise), that if gas thus intermingled after passing the West Virginia-Pennsylvania boundary has ceased to be in interstate commerce, gas thus confused before reaching the boundary, and applicable indiscriminately and without identification to local and out-of-state consumption, has not yet entered into interstate commerce.

In conclusion we submit that no ground exists for the exercise of the original jurisdiction of this Court herein; that upon the merits of the case the plaintiffs are not entitled to the relief prayed, or any part thereof; and that the restraining orders should be dissolved and the bills dismissed at the plaintiffs' costs.

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